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No. ——

IN THE

Supreme Court of the United States

AMERICAN AIRLINES, INC.,
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Airline Deregulation Act's preservation of the "proprietary powers and rights" of local governments owning airports permits local government authorities in the same metropolitan area to contract between themselves to finance, construct, and operate a modern, regional airport that accommodates all types of commercial passenger traffic into the metropolitan area, and then to limit their smaller airports to specific types of air service (*e.g.*, short-distance passenger flights, private aviation, or airfreight)?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following parties participated before the Department of Transportation or in the Fifth Circuit:

Continental Airlines, Inc.
Continental Express, Inc.
Legend Airlines, Inc.
Delta Air Lines, Inc.
Airports Council International, North America
American Association of Airport Executives
City and County of San Francisco, California
Greater Orlando, Florida, Aviation Authority
Allied Pilots Association
Southwest Airlines Pilots' Association

RULE 29.6 STATEMENT

Petitioner American Airlines, Inc. is a direct, wholly owned subsidiary of AMR Corporation. AMR Corporation has issued shares to the public. American Airlines, Inc. has outstanding debt securities that are publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

American Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 202 F.3d 788, and is reprinted in the Appendix at 1a-47a. The Department of Transportation's Declaratory Order and Order on Reconsideration are publicly available at 1998 WL 911847 (D.O.T.), and 1999 WL 218767 (D.O.T.), and are reprinted in the Appendix at 48a and 128a.

JURISDICTION

The judgment of the court of appeals was entered February 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent paragraphs of Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), as now codified at 49 U.S.C. § 41713(b), are as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Section 3(a) of the Airline Deregulation Act, as now codified at 49 U.S.C. § 40101(a)(8), requires the Secretary of Transportation to consider, as in the public interest:

> encouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities . . . .

Section 29 of the International Air Transportation Competition Act of 1979 (the "Wright Amendment"), as amended by Section 337 of the Department of Transportation and Related Agencies Appropriations Act of 1997 (the "Shelby Amendment"), is set forth in the Appendix (Pet. App. 152a).

STATEMENT OF THE CASE

A. Introduction

The single important issue presented by the decision below is whether the Airline Deregulation Act (the "ADA") preempts the authority of local governments to implement regional plans that allocate particular types of air traffic to specific airports. The Fifth Circuit construed the preemption provision of the ADA, 49 U.S.C. § 41713(b)(1), to forbid local governments from imposing and maintaining such restrictions (and thus from engaging in a critical component of regional planning) except in "extremely limited" situations where the governments can prove the restrictions are currently needed to reduce noise, pollution or traffic congestion. (Pet. App. 31a, 34a). The Fifth Circuit reached this result notwithstanding Congress's express declaration in the ADA that the preemption effected by § 41713(b)(1) "does not limit" local governments from "carrying out [their] proprietary powers and rights" as owners and operators of airports. 49 U.S.C. § 41713(b)(3).

The Fifth Circuit's strikingly crabbed reading of the scope of local proprietary authority preserved by the ADA warrants review by this Court.

First, the decision – and, in particular, its narrow construction of the term "proprietary powers and rights," 49 U.S.C. § 41713(b)(3) – directly conflicts with the decisions of the Colorado Supreme Court in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), and the Second Circuit in *Western Air Lines v. Port Authority*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). Contrary to the decision below, those courts have concluded that the ADA does not preempt a local airport proprietor's power to restrict some airports in a regional airport system to serve particular types of air traffic. This conflict is intolerable because local authorities are subject to differing legal requirements – supposedly based on the same federal statute – on an issue of fundamental local importance based upon nothing other than the federal circuit or state in which they happen to be located.

Second, there is a compelling need for this Court to settle the scope of the proprietary powers and rights reserved to local airport owners by the ADA. Congress did not expressly define the "proprietary powers and rights" of airport owners, and this Court in *City of Burbank* expressly left that issue open. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973). Guidance is urgently needed to provide the predictability that is essential for local governments to plan, finance, construct and operate regional airports, which will become even more important as air traffic increases. Absent clarification from this Court, municipalities will be unable to raise revenue from the financial markets to support such massive undertakings. If use restrictions cannot be enforced, local authorities will have no way to ensure the investment

community that a planned major airport will be able to generate sufficient revenue to support the bonds needed to construct and maintain it. Indeed, this uncertainty is made even worse by the Fifth Circuit's reasoning, which requires local governments to show that use restrictions are "currently needed," not that such restrictions were reasonable when imposed. (Pet. App. 94a). Thus, local authorities face the prospect that use restrictions providing the needed assurances to support revenue bonds may be preempted years in the future, even if they were a lawful exercise of local proprietary powers when initially imposed. Such a risk will cripple the prospects for long-term financing of such projects.

B. Factual Background

This case arose in the metropolitan area of Dallas-Fort Worth, Texas, and has produced highly publicized disagreements among the cities of Dallas and Fort Worth, several airlines, and the Department of Transportation (the "Department"). The controversy began in the early 1960's, when the Civil Aeronautics Board ("CAB") commenced a series of proceedings to force consolidation of scheduled passenger service at single, regional airports within several of the Nation's metropolitan areas. The CAB concluded that the decentralized airport systems that existed within those areas, with different air carriers serving different airports within the same metropolitan area, diminished the total volume of service available to each area and increased the cost and inconvenience of air transportation to passengers. *See In re Dallas-Fort Worth, Texas Regional Airport Investigation*, Docket 13959, CAB Order No. E-18719 (Aug. 20, 1962) (Pet. App. 165a).

One of the CAB's airport consolidation proceedings targeted the Dallas-Fort Worth area, which was then served by Love Field and Redbird Airport in Dallas, and Meachum Field

and Greater Southwest International Airport in Fort Worth. After lengthy public hearings, the CAB *ordered* that "service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger services." CAB Order No. E-21341 (Sept. 30, 1964) (Pet. App. 170a). The CAB provided that the cities could "arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service" and the "transition to service through [that] single airport" but warned that it would "proceed promptly to issue a decision if agreement was not reached within a limited time." *Id.* The CAB observed that Love Field's limited size and location in a densely populated area near downtown Dallas raised serious doubt as to whether it could accommodate the area's future air transportation needs. CAB Order No. E-22028 (April 13, 1965) (Pet. App. 172a).

Prodded by the CAB's orders, Dallas and Fort Worth entered into a joint venture to finance, build, and operate the new DFW Airport, to be located midway between the two cities. The cities' contract created the DFW Airport Board, whose members are appointed by the two city councils, to operate DFW Airport on the cities' behalf. *See* Texas Transportation Code §§ 22.072, 22.074 (authorizing contract) (Pet. App. 155a-157a). The cities jointly own DFW Airport, and jointly issue revenue bonds to finance its construction, operation, and improvement. (Pet. App. 158a). The cities sold revenue bonds in 1968 to finance initial construction, and have issued additional revenue bonds almost every year thereafter to finance improvements to the airport. In total, the cities have issued nearly $2 billion in revenue bonds. The cities' current outstanding obligations on these bonds are approximately $1 billion.

To authorize the issuance of the bonds, the cities concurrently enacted the same Regional Airport Bond Ordinance (the "Bond Ordinance") (Pet. App. 158a). In the Bond Ordinance, the cities covenanted with each other (and the purchasers of their bonds) to require all airlines serving the cities' existing airports to take the extraordinary step of relocating their scheduled passenger operations to DFW Airport. The cities also covenanted not to allow existing airports to compete with DFW Airport for international and interstate passenger service. (Pet. App. 162a). These covenants were absolutely critical to the financing, construction, and success of the new regional airport.[1] Each bond incorporates, as part of the contract between the cities and the bondholders, the covenants embodied in the Bond Ordinance. Without these covenants, investors would lack the assurance that DFW Airport would generate sufficient revenue to support the bond obligations.

When DFW Airport opened in 1972, Dallas announced its intention to close Love Field to scheduled passenger service and directed American and other airlines using Love Field to move all operations to the new airport. All carriers complied, except for Southwest Airlines Co., which was at that time a Texas *intrastate* air carrier authorized to operate only by the Texas Aeronautics Commission. Southwest obtained an order from state regulators enabling it to continue to use Love Field for flights within Texas. *See City of Dallas v. Southwest*

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[1]Both the Dallas and Fort Worth City Councils expressly found that the economic feasibility of DFW Airport depended on transferring the existing air carrier services at Love Field and Fort Worth's existing airports to the new airport. Fort Worth's then mayor has testified that "[DFW] Airport would never have come into existence but for the commitment of the cities to abandon their existing airports and to move all certificate passenger service into the new regional airport." Record, DOT Docket Item 47, pp. 18-19 & Tab 6.

Airlines Co., 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

In 1978, Congress enacted the ADA, which sought to deregulate interstate air transport and promote maximum reliance on competitive forces in that market. *See generally American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-28 (1995). Congress included a preemption provision (49 U.S.C. § 41713(b)(1)) to ensure that states did not impose rate, route or service regulations akin to those the ADA had eliminated on the federal level. Congress recognized, however, that the ADA's otherwise broad preemption provision might be read to interfere with traditional state and local prerogatives to finance, build and operate airports. Congress therefore made explicit, in the ADA itself, that § 41713(b)(1) "does not limit" the authority of state and local governments in carrying out this quintessentially local function. Respect for local authority was likewise reflected in § 3(a) of the ADA, which listed among factors that Congress found "as being in the public interest . . . encouraging air transportation at major urban areas through secondary or satellite airports, *if consistent with regional airport plans of regional and local authorities*." 49 U.S.C. § 40101(a)(8) (emphasis added). During floor debates, the House sponsor specifically confirmed that the ADA did not interfere with the agreement between Dallas and Fort Worth at issue in this case. 124 Cong. Rec. 30,670 (1978).

Congress later reconfirmed its position respecting the agreement. In 1979, Southwest Airlines utilized a short-lived "automatic market entry" provision in the ADA to establish its first interstate route from Love Field to New Orleans. Over the objections of Dallas and Fort Worth, the CAB concluded it lacked authority to deny Southwest's plan. *Southwest Airlines, AME Investigation*, 83 C.A.B. 644 (1979). Congress then promptly enacted the Wright Amendment in 1980, which

forbade the CAB and its successors from certificating air carrier service at Love Field, except for limited service restricted to Texas and four contiguous states. The Wright Amendment also contained an exception for "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" at Love Field (the so-called "commuter airlines exception"). (Pet. App. 152a).

The Conference Report explained that the Amendment's "most important point" is that it "provides a fair and equitable settlement of a dispute that has raged in the Dallas/Fort Worth area for many years." H.R. Conf. Rep. No. 96-716 at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 86. *See Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir.) (Wright Amendment "carries out the agreement between Dallas and Fort Worth that ended the competition between those cities for the area's principal airport"), *cert. denied*, 502 U.S. 907 (1991). The Wright Amendment contains no preemption provision of its own. The Conference Report explained "that the preemption and proprietary rights provisions of [49 U.S.C. § 41713(b)(1) & (3)] . . . apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Conf. Rep. No. 96-716 at 26 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 88.

Since 1980, scheduled passenger flights at Love Field have been limited to destinations within Texas and the four contiguous states. In 1997, however, Congress enacted the Shelby Amendment as a rider to an appropriations bill. It provides that the "commuter airline exception" to the Wright Amendment includes flights in large jet airplanes from which all but 56 seats are removed (Pet. App. 154a).

C. Judicial Proceedings

In late 1997, Fort Worth sued Dallas, the DFW Airport Board, and Legend Airlines in Texas state court to enforce the Bond Ordinance requiring all long-distance passenger service to use DFW Airport. American intervened in that action. Dallas and Legend pleaded as a defense federal preemption of the cities' agreement by the ADA and the Wright and Shelby Amendments (Pet. App. 8a). The state trial court ultimately rendered judgment that federal law did not preempt the Bond Ordinance.

In response to the Texas lawsuit, the Department of Transportation commenced the "interpretation proceeding" from which this case arises. Based solely on its interpretation of the ADA's commands, the Department issued a Declaratory Order holding, *inter alia*, that the ADA preempted Dallas's 1968 agreement with Fort Worth to restrict Love Field, and that the Wright Amendment impliedly preempted the agreement (Pet. App. 48a-75a, 79a-101a). In other words, the Department concluded that the ADA *mandated* preemption of the 1968 agreement.

American and others petitioned the Fifth Circuit for review of the Department's Order. The Fifth Circuit held that the covenants in the 1968 Bond Ordinance related to airline rates, routes, or services, and were therefore preempted by Section 4(a) of the ADA, 49 U.S.C. § 41713(b). The court concluded that the cities were not exercising "proprietary powers and rights" within the meaning of the ADA preemption provision when they agreed to limit use of Love Field, and thus were not exempt from preemption under 49 U.S.C. § 41713(b)(3) (Pet. App. 27a-36a). Having held that the Bond Ordinance's restrictions on the use of Love Field were preempted by the ADA, the Fifth Circuit did not reach the Department's

alternative ruling that the restrictions were impliedly preempted by the Wright Amendment.[2]

REASONS FOR GRANTING THE PETITION

There is a pressing need for review of the Fifth Circuit's decision for two related reasons.

First, the ruling is flatly in conflict with the Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 987 (Colo. 1998), as well as the Second Circuit's decision in *Western Air Lines v. Port Authority*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). It is intolerable that Denver and New York should be able to maintain use limitations applied to smaller regional airports, while Dallas and Fort Worth may not. The situation is particularly grave because the Fifth Circuit's ruling jeopardizes the commitments on which more than $1 billion in outstanding bond obligations rest.

Second, as this case illustrates, the present uncertainty over the power of local authorities to engage in regional planning needs to be resolved. Until the law is clarified, all local governments that consider developing new regional airports – and there are a number currently working on such projects – will face the problem that investors and the public can receive

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[2]The Fifth Circuit did state in a footnote that it need not reach the question whether the Wright and Shelby Amendments impliedly preempted the 1968 agreement because it was expressly preempted by "the Amendments." (Pet. App. 36a n.17). Because the Amendments contain no express preemption provision, the court cannot have meant what it said literally. In context, it is plain that the court intended to state that it need not decide the implied preemption issue because the ADA itself expressly preempted the 1968 agreement.

no binding assurance about the future use of existing or planned facilities. If use restrictions cannot be enforced, or can be retroactively invalidated years later as the Fifth Circuit permitted here, there is little prospect that local authorities will be able to depend on the financial markets to raise the funds needed for regional airports.

I. The Court Should Grant Review Because the Fifth Circuit's Decision Conflicts with Prior Rulings of the Colorado Supreme Court and the Second Circuit, as Well as Consistent Interpretations of the ADA by Executive Branch Officers over Many Years.

The Fifth Circuit's ruling has created serious conflicts among the courts that have addressed the central issue presented here. First, as the Fifth Circuit itself noted, there is no way to square the ruling below with the decision of the Colorado Supreme Court in *Arapahoe County*, 956 P.2d 587 (Pet. App. 33a-34a). *Arapahoe County* involved Centennial Airport, located a few miles from downtown Denver, which by its proprietor's decision is restricted to private aircraft. A Regional Aviation System Plan for the Denver area designates the new Denver International Airport as the sole airport for scheduled commercial passenger service into the region. 956 P.2d at 589-90. Centennial Express Airlines ("Express") announced its intention to commence scheduled passenger operations between Centennial Airport and points in Texas and Colorado. The Arapahoe County Airport Authority sued to enforce its prohibition against scheduled passenger service at the airport.

Ruling in favor of the Airport Authority, the Colorado Supreme Court held:

> . . . we believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception. . . . The power to control an airport's size exists at the core of the proprietor's function . . . .

956 P.2d at 595.

The Fifth Circuit expressly acknowledged the conflict with the Colorado Supreme Court, asserting that the *Arapahoe County* opinion would "expand the regulatory role of municipal owners far beyond the 'extremely limited role' envisioned by the ADA." (Pet. App. 33a-34a).[3] As the Fifth Circuit recognized, the decision of the Colorado Supreme Court in *Arapahoe County* would plainly allow an airport proprietor to restrict its airport to short-distance passenger operations (like those permitted at Love Field), provided that another airport in the same metropolitan area accommodates all air passenger traffic on an unrestricted basis. Restricting classes of service at an airport, on a basis that does not discriminate among airlines, is part and parcel of a proprietor's right to control the size of its airports.

The Fifth Circuit's decision also conflicts with the holding in *Western Air Lines*, 817 F.2d 222, *affirming* 658 F. Supp.

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[3]The Federal Aviation Administration ("FAA") later disagreed with the Colorado Supreme Court's decision in *Arapahoe County* and ordered the Airport Authority to accommodate scheduled passenger service at Centennial Airport, even though the airport is not equipped to do so. That dispute is still pending. *See Centennial Express Airlines*, FAA Order No. 1999-1 (Part 16, Subpart G) (Feb. 18, 1999), *petition for review pending* as No. 99-9508 (10th Cir. filed Mar. 10, 1999).

952, in which the Second Circuit held that it was within the Port Authority's proprietary powers and rights to restrict use of LaGuardia Airport to flights of 1,500 miles or less. The Second Circuit so ruled even though the court assumed, for the purpose of its analysis, that the Port Authority's perimeter rule is a form of "route regulation." In an earlier case, the Fifth Circuit correctly described the Port Authority's perimeter rule at LaGuardia and the Texas-plus-contiguous-states limitation on Love Field as "similar" restrictions. *Cramer v. Skinner*, 931 F.2d at 1030 n.8. But the Fifth Circuit has now held that the ADA preempts Dallas and Fort Worth from imposing such a restriction in their Bond Ordinance, even though the Second Circuit refused to preempt the Port Authority's similar restriction.

The Fifth Circuit's attempt to distinguish *Western Air Lines* is unpersuasive. The court assumed that the Port Authority's perimeter rule was justified by a need to reduce ground congestion at LaGuardia (Pet. App. 32a). That distinction fails for two reasons. *First*, there were *two* stated purposes for the LaGuardia perimeter rule: "to reduce ground congestion *and* maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark." *Western Air Lines, Inc. v. Port Authority*, 658 F. Supp. 952, 953 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). In the decision below, the Fifth Circuit focused only on the former.

Second, like the Port Authority's perimeter rule, the restrictions on Love Field in the 1968 Dallas-Fort Worth Bond Ordinance were imposed, in part, as a result of findings made by the CAB after comprehensive studies that Love Field could not handle the Dallas-Fort Worth area's commercial air traffic past the early 1970's. Planning for the future, Dallas and Fort Worth built DFW Airport to accommodate their area's growing

traffic and thus to alleviate the looming problem of congestion at Love Field. Under the Fifth Circuit's analysis, Dallas presumably could have restricted Love Field had DFW Airport *not* been built before congestion overwhelmed Love Field. But perversely, the Fifth Circuit reasoned that, because Dallas and Fort Worth acted effectively to prevent gridlock at Love Field, the cities now have no local interest sufficient to enforce the very restrictions that prevented such congestion in the first place. If not corrected by this Court, that ruling will stymie the efforts of local governments around the Nation who seek to enact responsible regional plans to meet airport needs of the future.

The Fifth Circuit's decision rests on the premise that Congress intended local governments to play an "extremely limited" role in matters that affect aviation. The Fifth Circuit found support for this statement in *National Helicopter of America Corp. v. City of New York*, 137 F.3d 81 (2d Cir. 1998). *National Helicopter*, in turn, relied on *British Airways Board v. Port Authority*, 564 F.2d 1002, 1010 (2d Cir. 1977), which predated the ADA and addressed only the power of local governments "to regulate planes in flight." *Id.* Specifically, *British Airways* dealt with the Port Authority's attempt to ban one type of aircraft, the Concorde, from landing at Kennedy Airport even though the Concorde met the Port Authority's generally applicable noise regulations. The Second Circuit's unexceptional recognition in *British Airways* that local governments have "extremely limited" authority to regulate the airspace was never intended as a categorical description of airport owners' proprietary powers and rights. Congress certainly did not describe those powers and rights as

"extremely limited," and the ADA is not susceptible to such a reading.[4]

The Department's ruling and the Fifth Circuit's affirmance of it are all the more suspect because they conflict directly with the Department's own position in support of a perimeter rule for Ronald Reagan National Airport. The FAA justified that rule as an exercise of its "legitimate" proprietary powers as owner and operator of Dulles and National Airports.[5] On August 14, 1981, then-Secretary of Transportation Lewis wrote to Senator Bentsen as follows:

> As you point out, the [ADA] has placed airline decisions with airline management and not with the Federal Government. However, the Act also specifically preserved airport proprietors' responsibilities and rights. *The proposed [perimeter rule at National] is, in large part, an exercise of our responsibility as proprietor of two airports that have a significant impact throughout the Washington area.* No air carrier will be denied service to Dulles; therefore no air carrier will be denied service to

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[4] If anything, the Fifth Circuit's decision conflicts with *National Helicopter Corp.* It is true, as the Fifth Circuit noted, that the Second Circuit held that the ADA preempted a New York City regulation that prohibited sightseeing helicopters from flying across Manhattan over Second Avenue and required regional helicopters flying north or south to remain over the East or Hudson Rivers. That holding is unexceptional because the regulation attempted to control the routes of aircraft while in flight. But the Second Circuit *sustained* a municipal regulation designed to reduce by 47% the number of helicopter operations at the City's Manhattan heliport, thereby affirming the City's proprietary right to control the size of its heliport.

[5] Brief for the United States as *Amicus Curiae* in *Delta Airlines, Inc. v. Port Authority*, No. 87-333 at 6 (U.S. filed March 29, 1988).

> Washington. Whether to serve Washington is an airline decision. However, *whether there should be a long-haul or short-haul role designated for National or Dulles Airports is a legitimate airport proprietor's decision.*

Record, DOT Docket Item 47 at 2, Tab 10 (emphasis added). Similarly, when the Department and the FAA defended that perimeter rule before the Fifth Circuit, they wrote:

> . . . [T]he FAA, like any other proprietor of two or more regional airports, can promulgate rules in order to distribute flights between the airports in a rational manner. Courts have repeatedly upheld the authority of airport proprietors to impose a variety of controls in order to satisfy local needs or to ameliorate local problems.
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> . . . [T]he CAB and the FAA . . . have throughout the years consistently stated that an airport proprietor may discriminate between types, kinds and classes of aeronautical usage when the proprietor operates more than one airport and seeks merely to differentiate between types of aircraft using the airports.[6]

The conflict created by the Fifth Circuit's decision should be resolved now. As matters stand, use restrictions in Denver and New York are enforceable, while a virtually identical

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[6] Response of the Federal Respondents in *City of Houston v. FAA*, No. 80-2030 at 20-21, (5th Cir. filed May 26, 1981) (footnote omitted) Record, DOT Docket Item 47, Tab 11.

restriction in the Dallas-Fort Worth area is not. Local authorities are thus subject to differing legal requirements based solely on the happenstance of geographical location. More importantly, the ramifications of the Fifth Circuit's decision extend far beyond the continued enforcement of the use restrictions related to DFW Airport. Across the Nation, local governments have relied on their reasonable understanding of the scope and nature of "proprietary powers and rights" to limit the use of the airports they create and operate. When Kansas City, Missouri, built a large, regional airport some distance north of the city, it limited its old, downtown airport to use by small aircraft. Similarly, there are plans to build a new regional airport for commercial airline service into western West Virginia and when that airport opens, to limit the existing airports in Charleston and Huntington to general aviation. Without knowing whether the Eighth and Fourth Circuits will adopt the interpretation of the Colorado Supreme Court and the Second Circuit on the one hand, or the Fifth Circuit on the other, government entities in Kansas City and West Virginia proceed at their peril in operating their airports. Moreover, hundreds of publicly owned airports around the Nation accommodate only small-private and corporate aircraft. The Fifth Circuit's decision casts all such arrangements into doubt.

II. The Court Should Grant Review Because the Fifth Circuit and Department of Transportation Have Given Such a Narrow Scope to the Proprietary Powers and Rights of Local Governments Owning Airports That it Will Be Impossible for Local Governments To Plan for, Finance, and Construct the New Regional Airports the Nation Needs.

The Fifth Circuit's decision gives such a narrow scope to airport owners' proprietary powers that it will be impossible for local governments to finance, build, and operate the new regional airports the Nation will need over the coming years.[7] This profound interference in a vital local governmental function can only be justified by compelling evidence of congressional intent, which is utterly lacking here. Thus, this Court should grant review to clarify that Congress did not intend to oust regional and local authorities from their traditional role in planning and operating airports. Such clarification is necessary to ensure that regional and local authorities can enact and implement long-term regional plans.

When Congress deregulated airlines in 1978, it not only preserved, but expressly "*[did] not limit*," the proprietary powers and rights of the state and local governments that own and operate most of the Nation's airports. 49 U.S.C. § 41713(b)(3) (emphasis added). To be sure, Congress did not provide a definition of the "proprietary powers and rights" of local airport owners that were saved from preemption, and this Court has expressly reserved that issue for consideration. *See City of Burbank*, 411 U.S. at 635-36 n.14. But Congress

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[7] The FAA has projected that the Nation's air passenger traffic will rise by more than 50 percent in the next ten years and that airfreight traffic will double during the same period.

plainly intended to preserve the ability of state and local governments to exercise this important local function even if it affects airline rates, routes or services. Otherwise, there would have been absolutely no need to carve out an exemption from the ADA's preemption provision.

The Fifth Circuit agreed that "the precise scope of an airport owner's proprietary powers has not been clearly articulated by any court." (Pet. App. 31a). Nevertheless, the Fifth Circuit asserted that the ADA restricts local airport proprietors to an "extremely limited role" in aviation matters. (Pet. App. 31a, 34a). In the Fifth Circuit's view, local governments owning airports may not restrict any type of air traffic from any of their airports, or allocate different types of air traffic among airports in the region, unless they prove a "specific local interest," based on "local problems arising at and around their facilities," that would justify their action. (Pet. App. 31a). According to the Fifth Circuit, such local interests might include alleviating noise, ground congestion, or pollution (Pet. App. 32a). Although the court held open the possibility that other types of "local interests" also might justify such restrictions (Pet. App. 35a), it believed that the implementation of comprehensive regional airport agreements, such as that between Dallas and Fort Worth, fell outside the protected sphere and were preempted.[8] (Pet. App. 35a). Moreover, the Fifth Circuit affirmed the Department's view

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[8]The Department's Declaratory Order states that the only permissible "legitimate" reasons for a proprietor's restrictions are prevention of noise or other environmental problems, congestion, and perhaps to protect a failing airport. (Pet. App. 81a-99a). But, as the Solicitor General stated in the Brief for the United States as *Amicus Curiae* in the *Western* case, *supra* n.6, had Congress intended to limit proprietors to controlling noise or congestion or saving failing airports, "Congress presumably would have drafted the provision more narrowly than it did."

that such restrictions may be upheld only if they are "currently needed" (Pet. App. 94a), irrespective of whether they were needed at the time they were imposed.

The Department's Declaratory Order, which the Fifth Circuit affirmed, was expressly *not* based on policy considerations or administrative determinations regarding the best way to operate the Nation's airports. Indeed, the Department emphasized throughout its Order that it was not "taking discretionary action on its own," (Pet. App. 78a) and was "merely interpreting statutes that Congress has already enacted, not creating new obligations and mandates on its own" (Pet. App. 101a). Thus, the Department believed that the ADA *required* preemption here, and the Fifth Circuit affirmed on that basis. But nothing in the text of the ADA or the statute's legislative history supports the Fifth Circuit's reading of the statute, much less provides the kind of clear statement of preemptive intent ordinarily required under the Supremacy Clause. *English v. General Electric Co.*, 496 U.S. 72, 79, 83 (1990). The language Congress chose reflects a specific intention *not* to preempt to any degree the proprietary powers of local governments operating airports. Congress started the ADA's preemption provision with the limiting phrase "[e]xcept as provided in this subsection," 49 U.S.C. § 41713(b)(1), and then in the same subsection, Congress stated that the statute "does not limit" local governments owning airports served by federally certificated air carriers from "carrying out" their proprietary powers and rights. 49 U.S.C. § 41713(b)(3). The statutory structure thus also directly supports the conclusion that local governments retain broad proprietary powers and rights in operating airports.

The legislative history confirms that Congress intended in the ADA to preserve airport owners' proprietary powers. Congressman Anderson of California, floor manager for the

ADA in the House, stated: "It was not the intent of the House conferees to limit in any way the normal exercise of a proprietor's powers to determine the level and nature of service to be provided at airports, subject to constitutional and statutory limitations . . . ." 124 Cong. Rec. 38,526 (1978). *See also* 124 Cong. Rec. 37,419-20 (1978) (similar statement during Senate debate). Indeed, the Dallas-Fort Worth agreement restricting Love Field was discussed during the Congressional debates on the ADA, and the House sponsor made clear that the ADA did not interfere with the agreement between Dallas and Fort Worth. 124 Cong. Rec. 30,670 (1978).

Absent the clearest indication that Congress intended to do so, the courts should not prohibit local governments owning airports from entering into, and carrying out, regional airport plans such as that at issue here. Beyond the requirements of the Supremacy Clause, this is true for several reasons:

A. The Fifth Circuit's reading of the ADA will cripple the ability of local authorities to raise revenues to implement regional airport plans. State and local governments routinely issue bonds payable only from the revenues from a new public facility, and covenant not to operate competing facilities that might divert revenues. Airport revenues come principally from the rentals and landing fees paid by commercial airlines using the airport, so it is important to channel such operations to the new airport to protect that airport's financial integrity, even if that means closing existing airports to such operations. The realities of the market for municipal bonds often compel such restrictions, and the federal courts have sustained similar types of covenants against legal attack. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (Contracts Clause prohibited retroactive repeal of bond covenant prohibiting the Port Authority of New York and New Jersey from spending its

revenues for rail transit); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 427 (8th Cir. 1983) (sustaining regulation requiring all solid waste to be disposed of at municipal facilities financed by revenue bonds), *cert. denied*, 471 U.S. 1003 (1985). Issuing bonds to raise money necessary to build, operate, and improve a new airport is at the heart of the proprietor's role. There simply is no basis for the Fifth Circuit's decision that Congress intended to make it impossible for local governments to comply with the covenants that were a necessary incident to that role.

Paradoxically, the only option the Fifth Circuit's decision allows local governments opening new airports is to *destroy* their existing airports to prevent them from competing with the new airport. There is no rational basis for compelling local governments to make such a wasteful choice. Older, smaller airports can be used for private aviation, thereby diverting small, slower aircraft away from major regional airports. Existing airports can accommodate freight service, and they can be used (as Love Field has been used for 20 years and as LaGuardia Airport is used) for short-haul flights. In the event of bad weather, runway obstructions, or other emergencies at the regional airport, existing airports can provide backup landing alternatives for aircraft already in flight.

B. There is nothing about long-term regional airport planning, such as that demonstrated by the Dallas-Fort Worth agreement, that diminishes the Nation's airport system or that interferes in any way with the FAA's ability to guide aircraft through the Nation's airspace. Indeed, the opposite is true. The Dallas-Fort Worth agreement resulted in the opening of DFW Airport, which dramatically increased and modernized the airport facilities available within the Dallas-Fort Worth area. Dallas and Fort Worth fully accommodate all air traffic

coming into their metropolitan region at one or more of their airports. DFW Airport is open to *all* types of traffic. Dallas restricts its Redbird Airport to small private aircraft, and has held Love Field open only for short-distance flights within Texas and the four contiguous states. Fort Worth's Meacham Field accommodates small private aircraft and for some periods has accommodated limited intrastate passenger service between Fort Worth and Houston. Fort Worth has restricted its new, modern Alliance Airport to airfreight (Pet. App. 99a n.19).

The Dallas-Fort Worth plan does not interfere with the FAA's exclusive authority to manage the Nation's *airspace*. 49 U.S.C. § 40103. Unlike the 11 p.m. curfew on jet aircraft this Court held preempted in *City of Burbank*, 411 U.S. 624, Dallas's restrictions on Love Field have no potential for requiring the FAA to divert planes in flight, or to create a localized "fractionalized control of the timing of take-offs and landings" that would compromise the FAA's air traffic control flexibility. The Bond Ordinance simply declares Love Field not available as a point of origin or destination for scheduled long-distance flights, just as if Love Field did not exist. Thus, no airline would schedule long distance flights to take off from, or land at, at Love Field. Nor is the restriction discriminatory. No airline would operate long-distance flights from Love Field, and all could operate short-distance flights.

C. Even if the Fifth Circuit is correct that local governments must prove a "specific local interest" that would be addressed by a particular restriction (and that requirement is not supported by anything in the statute), the Dallas-Fort Worth agreement was neither reached nor structured without

reason or justification, as the Fifth Circuit seemed to assume. (Pet. App. 35a).[9]

Ironically, the CAB *ordered* Dallas and Fort Worth to agree to designate a single regional airport and to transfer all scheduled passenger service to that airport. Before that agreement was made, the CAB held extensive evidentiary hearings and the two cities conducted extensive environmental, land use, and traffic studies that demonstrated the need for focusing scheduled passenger service at a single regional airport. When Dallas and Fort Worth completed their agreement, they filed it with the CAB, whereupon the CAB dismissed its proceeding, finding that the new DFW Airport would satisfy the CAB's requirement for the cities to provide an adequate, single facility to accommodate all air transportation needs of the Dallas-Fort Worth region. CAB Order No. 73-9-82 (Sept. 21, 1973). Now, 30 years later, the

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[9] The Fifth Circuit saw no local interest sufficient to justify the restrictions that Dallas and Fort Worth placed on Love Field when they formed their 1968 joint venture to finance, construct, and operate DFW Airport *even though*: (1) the CAB had ordered the two cities to agree on a single regional airport to serve their metropolitan area and to move all passenger service to that airport; (2) the CAB had found that Love Field was too small and confined by its surroundings to accommodate the area's traffic; (3) the cities undertook extensive land use, traffic and environmental studies that supported concentrating all commercial passenger traffic at a new, centrally-located regional airport; (4) the cities financed DFW Airport with revenue bonds and restricted their other airports to protect DFW's revenues; (5) the cities' agreement has been in effect for more than 20 years, with countless third parties (including American) having made major relocation and investment decisions in reliance on that agreement; and (6) the Dallas-Fort Worth agreement has resulted in the construction of one of the world's largest and most important airports and has provided a level of economic activity and commercial air service to the citizens of the Dallas-Fort Worth metropolitan area that is surpassed only in much larger population centers. These local interests plainly justify restrictions on airport use.

Fifth Circuit and the Department (the CAB's successor) have ruled that same agreement exceeds the cities' proprietary powers. It is simply untenable for the federal government now to assert that a regional airport plan adopted to comply with prior federal directions was enacted for illegitimate purposes and without adequate justification.

Although the Fifth Circuit did not specify the point in *time* at which local governments must prove to the satisfaction of the courts that they have a specific "local interest" sufficient to justify restrictions such as those imposed on Love Field in 1968, the court plainly required that such restrictions must be continually justified at all times. The Department ruled that the restrictions must be justified whenever a challenge is raised, not only when the restrictions were imposed. In the Department's words, the proprietor must prove that the restrictions "are currently needed." (Pet. App. 94a). The Fifth Circuit affirmed that position, paying scant attention to the volumnious record evidence justifying the restrictions.

That shifting-sands ruling simply precludes long-term regional airport planning. Even if, as here, local governments act prudently and comprehensively in conducting studies, and entering into agreements for the multi-year regional financing, construction, and operation of airports within their metropolitan area (even with federal approval at the time), they can never be certain that the Department or an airline seeking to operate in violation of their agreement will not go to court at some time in the future and have their agreement declared preempted. As a result, the ability of local governments to attract investors, and to induce carriers to undergo the enormous expense and disruption associated with abandoning one airport and launching operations in another, will be crippled. Once a long-term agreement is signed or bond ordinance enacted, its reasonableness or "legitimacy" must be

tested as of the time of its making. Local governments cannot be put to the disabling burden of proving the continued "necessity" on a day-to-day basis into the future of agreements they have made and implemented.

The Fifth Circuit's decision is thoroughly unsound and particularly unfortunate. Unless reviewed by this Court, it will prevent regional airport planning by local governments throughout the Nation. Without any evidence that Congress plainly intended such a bizarre outcome, the Court should grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

AMERICAN AIRLINES, INCORPORATED; City of Dallas, Texas; Southwest Airlines Company; Love Field Citizens Action Committee,
Petitioners,
v.
DEPARTMENT OF TRANSPORTATION, Respondent.
The City of Fort Worth; Dallas-Fort Worth International Airport Board,
Petitioners,
v.
Department of Transportation, Respondent.

Nos. 99-60008, 99-60239.

United States Court of Appeals,
Fifth Circuit.

Feb. 1, 2000.

Parties including two interstate air carriers, cities of Dallas and Fort Worth, and board of Dallas-Fort Worth regional airport petitioned for review of United States Department of Transportation (DOT) declaratory order resolving nature of air passenger services permissible from Love Field airport in Dallas, Texas. Three additional interstate air carriers intervened. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) order was not a substantive rule subject to notice and comment period under Administrative Procedure Act (APA); (2) DOT was not required to grant preclusive effect to rulings in pending, previously initiated state law suit involving some of same parties and issues; (3) ordinance adopted by Dallas and Fort Worth imposing restrictions on airline passenger service

from Love Field airport was preempted by the Airline Deregulation Act (ADA); (4) DOT's interpretation of commuter airline exemption to Wright Amendment to International Air Transportation Competition Act to include reconfigured regional jets was reasonable; and (5) DOT ruling which allowed commuter planes to provide through service if they first flew to a point within Texas was reasonable interpretation of the Wright Amendment.

Affirmed.

Michael Vance Powell (argued), Morris Harrell, Cynthia Keely Timms, Locke, Liddell & Sapp, Dallas, TX, Anne Hogan McNamara, Robert B. Wark, American Airlines Inc., Fort Worth, TX, for American Airlines, Inc.

Thomas Lawrence Ray (argued), Paul Maitland Geier, Washington, DC, Marion L. Jetton, Robert B. Nicholson, U.S. Dept. of Justice, Antitrust Div., App. Section, Washington, DC, for Dept. of Transp.

Edward P. Faberman (argued), Ungaretti & Harris, Washington, DC, for Legend Airlines.

R. Bruce Keiner, Jr. (argued), Crowell & Moring, Washington, DC, Randall W. Wilson, Houston, TX, Emery Lawrence Vincent, Susman Godfrey, Dallas, TX, for Continental Express.

Robert W. Kneisley, Washington, DC, Michael Byrd, Dallas, TX, James F. Parker (argued), Southwest Airlines Co., Dallas, TX, for Southwest Airlines Co.

Lee L. Blackman, Richard Karl Simon, McDermott, Will & Emery, Los Angeles, CA, for Airports Council Intern., North America and American Ass'n of Airport Executives, Amicus Curiae.

James E. Coleman, Jr., Lyndon F. Bittle (argued), Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, for City of Dallas, TX.

Alan W. Harris (argued), Andrews & Kurth, Dallas, TX, for Love Field Citizens Action Committee.

Dee J. Kelly, Sr. (argued), Brian Scott Stagner, Kelly, Hart & Hallman, Fort Worth, TX, for City of Fort Worth.

Jonathan Glen Kerr (argued), Joseph Wilson Spence, Steven James Graham, Shannon, Gracey, Ratliff & Miller, Fort Worth, TX, Michael J. Goldman, Bagileo, Silverberg & Gildman, LLP, Washington, DC, for Dallas-Fort Worth Intern. Airport Bd.

Petitions for Review of an Order of the U.S. Department of Transportation.

Before DUHE, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This consolidated appeal involves respondent Department of Transportation's ("DOT's") interpretation of federal law governing airline service at Love Field airport. Petitioners Dallas-Fort Worth International Airport Board ("DFW Board"), City of Fort Worth ("Fort Worth"), American Airlines, Inc. ("American"), City of Dallas ("Dallas"), Southwest Airlines Company ("Southwest"), and Love Field Citizens Action Committee (the "Committee") petition for review of DOT's declaratory, procedural, and reconsideration orders. Legend Airlines, Inc. ("Legend"), Continental Airlines, Inc. ("Continental"), and Continental Express, Inc. ("Continental Express") have intervened. For the reasons set forth below, we affirm.

I

Prior to 1968, Dallas and Fort Worth operated independent and competing airports. One of Dallas's airports was Love Field. DOT's predecessor agency, the Civil Aeronautics Board ("CAB"), found that the competition between Dallas's and Fort Worth's airports was harmful. Accordingly, in 1964 CAB ordered the cities to build a jointly-operated airport that would serve as the region's primary airport. The cities responded by creating the DFW Board and by jointly adopting the 1968 Regional Airport Concurrent Bond Ordinance (the "Ordinance"). The Ordinance authorized the issuance of bonds to finance the Dallas-Fort Worth Airport ("DFW"). Of critical importance here is section 9.5 of the Ordinance, which contained the cities' agreement to "take such steps as may be necessary, appropriate and legally permissible ... to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the [DFW] Regional Airport."

The eight CAB-certified air carriers who were using the Dallas and Fort Worth airports first signed "letter agreements" and then later signed "use agreements" with the DFW Board, agreeing to move their air services to DFW as specified in the Ordinance. Southwest, which was solely running intrastate flights from Love Field and thus was exempt from CAB certification and pressure, refused to move to DFW and did not sign a use agreement. Litigation ensued over efforts to force Southwest from Love Field, terminating with our statement that "Southwest Airlines Co. has a federally declared right to the continued use of and access to Love Field, so long as Love Field remains open." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 103 (5th Cir. 1977).

Congress deregulated the airline industry in 1978. Shortly thereafter, Southwest applied for permission to provide interstate service between Love Field and New Orleans. CAB granted the application, concluding that it lacked power to deny it. This prompted Congress to intervene by enacting the Wright Amendment. *See* Pub.L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980). The Wright Amendment generally bans interstate service from Love Field.[1] However, it provides certain

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[1] In its entirety, the Wright Amendment states:

> (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
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> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979 may continue to service to such point.
>
> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas and one or more points

exemptions from this ban, two of which are significant here: (1) the commuter airline exemption allows interstate "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less"; and (2) the contiguous state exemption allows flights to and from Louisiana, Arkansas, Oklahoma, and New Mexico, if the flights do not "provide any through service or ticketing with another air carrier" and do not "offer for sale transportation to or from ... any point which is outside any such State." *Id.*

In 1996, Dalfort Aviation, the parent corporation of Legend, announced plans to take advantage of the commuter airline exemption by reconfiguring large commuter planes to hold only 56 seats. In response, the DOT General Counsel issued an opinion holding that the exemption applied only to aircraft originally configured to seat less than 57 passengers. The DOT opinion was mooted by the 1997 passage of the "Shelby Amendment" (collectively with the Wright Amendment, the "Love Field amendments"). The Shelby Amendment defined the term "passenger capacity of 56 passengers or less" in the commuter airline exemption to "include[ ] any aircraft, except

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within the State of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrieror foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979. *Id.*

aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56." *See* Pub.L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).[2] The Shelby Amendment also expanded the contiguous states exemption to allow direct flights between Love Field and airports within Kansas, Alabama, and Mississippi. *See id.*

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[2] The Shelby Amendment provides in its entirety that:

> (a) IN GENERAL.--For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
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> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION.--The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".
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> (c) SAFETY ASSURANCE.--The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas- Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.
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> *Id.*

The parties in this case responded in various ways to the Shelby Amendment. Southwest began offering flights between Love Field and Mississippi and Alabama. Legend has announced plans to offer longhaul service to states outside the Love Field service area using large aircraft reconfigured to have less than 57 seats. Continental Express plans to use regional jets with less than 57 seats to fly between Love Field and Cleveland. Continental Express and American offer intrastate flights from Love Field to their hubs, in Houston and Austin respectively.

In response, Fort Worth sued Dallas, the DFW Board, Legend, Continental, and Continental Express in Texas state court to block the proposed additional service from Love Field. The state court found that the Ordinance was not preempted by federal law and that Dallas was obligated by the Ordinance to preclude airlines from flying between Love Field and areas outside Texas and the four-state service area authorized by the Wright Amendment. The state action is currently on appeal, although the state appellate court has stayed the appeal pending our resolution of this case.

While the state court action was pending, Dallas filed a federal suit against DOT and Fort Worth requesting declaratory relief on essentially the same issues involved in the state action. The federal court has stayed that proceeding pending resolution of the instant case.

At the urging of several of the parties, and while both the federal and state actions were pending, DOT initiated the interpretative proceeding that is the subject of this petition for review. DOT issued an order informing the parties in this action[3] that it intended to rule on four "federal law issues" and

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[3] Notice of this order was not sent to the Committee. The Committee subsequently learned of the proceeding and DOT granted its request for an extension of time to file comments.

allowing the parties an opportunity to submit comments on these issues. Subsequently, in response to the parties' initial comments, DOT issued a procedural order which, inter alia, granted the DFW Board's request to resolve a fifth legal issue and granted several parties' request for an extension of time in which to file comments.

DOT ultimately issued a "Declaratory Order" resolving the five questions it had set forth. Specifically, DOT ruled that:

> (i) the City of Fort Worth may not enforce any commitment by the City of Dallas ... to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and

> any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment....

Declaratory Order at 58. In an accompanying "Procedural Order," DOT rejected various procedural objections raised by the parties. DOT subsequently reaffirmed its rulings on reconsideration.

II

We have jurisdiction to review DOT's declaratory order by this petition for review. *See* 49 U.S.C. § 46110(e) ("[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation ... may apply for review of the order by filing a petition for review in the ... court of appeals of the United States for the circuit in which the person resides or has its principal place of business."). The standard of review we apply differs according to the specific action DOT took. Our review of DOT's interpretation of the statutes it is charged with administering is governed by the two-step standard of review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). We first determine whether Congress directly spoke to the precise question in issue. If the intent of Congress is clear, then we, and the agency, must give effect to the unambiguously expressed intent of Congress. See *id.* at 842-43, 104 S. Ct. at 2781. If Congress has not directly addressed the precise question in issue, we ask whether the agency's interpretation was "based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782. As long as the agency's construction of an ambiguous statute is permissible, it must be upheld. *See id.; Texas Oil & Gas Assoc. v. EPA*, 161 F.3d 923, 937-38 (5th Cir. 1998).

However, we only engage in the Chevron analysis when reviewing an agency's interpretation of a statute it was charged with administering. When reviewing DOT's interpretation of a statute it is not charged with administering, we do not grant DOT Chevron deference. *See American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("We do not, however, accord Chevron deference to EPA's interpretation of the ESA, because the ESA is not a statute that EPA is charged with administering.").

III

Several of the parties challenge DOT's declaratory order on procedural grounds. They argue that: (a) DOT violated the Administrative Procedure Act ("APA"), (b) its order improperly contravened the earlier state court ruling on the same issues, and (c) DOT failed to comply with environmental requirements before issuing its order.

A

Fort Worth and the DFW Board argue that DOT's ruling violated the APA in various ways. *See* 5 U.S.C. § 706 (directing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law"). Although DOT has already rejected some of these challenges in its earlier rulings, we review de novo DOT's interpretation and application of the APA. *See Professional Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) ("The Supreme Court has indicated, however, that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer.").

I

Several parties contend that DOT failed to provide them with sufficient notice as required under § 554(b) or, alternatively, § 553, of the APA. We exercise plenary review over whether DOT complied with applicable procedures. *See Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 198 (5th Cir. 1989).

DOT issued its declaratory order after conducting an informal adjudication, pursuant to its authority under § 554(e) to "issue a declaratory ruling to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *See also Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) ("The ICC's declaratory order was issued after an informal adjudication pursuant to the authority conferred by 5 U.S.C. § 554(e) to 'issue a declaratory ruling to terminate a controversy or remove uncertainty.' Rendered in a specific factual context and resolving only the questions presented by [the petitions], it 'belongs to the genre of adjudicatory rulings.' ") (citations omitted). Several parties object to DOT's failure to adhere to the APA's notice requirements for formal adjudications. However, in the absence of a statute requiring an agency to conduct its adjudication "on the record after opportunity for agency hearing," 5 U.S.C. § 554(a), an agency can define its own procedures for conducting an informal adjudication. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655-56, 110 S. Ct. 2668, 2680-81, 110 L.Ed.2d 579 (1990).

While the APA does not expressly require notice in informal adjudications, courts have inferred a requirement that there be "some sort of procedures for notice [and] comment ... as a necessary means of carrying out our responsibility for a thorough and searching review [of agency action]." *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982). Here, DOT issued an order in which it specified the legal issues on which it would rule, allowed the

parties to submit comments on these issues, and extended the comment period at the request of several parties. It then ruled on precisely the issues that it identified. We find that DOT's actions satisfied the minimum procedural notice requirements. *See id.*

Fort Worth contends that DOT failed to comply with § 554(b) by neglecting to notify parties that DOT would also be considering a factual issue: the effect of increased service at Love Field on DFW Airport. This argument fails for two reasons. First, as noted, the formal notice requirement of § 554(b) does not apply to an informal adjudication. Second, the parties were effectively on notice of this issue since it was one that they could reasonably expect to arise given the issues of which DOT gave notice. *Cf. Boston Carrier Inc. v. Interstate Commerce Comm'n*, 746 F.2d 1555, 1559 (D.C. Cir. 1984) ("The Commission is not burdened with the obligation to give every applicant a complete bill of particulars as to every allegation that carrier will confront."). The fact that Dallas, Continental Express, and Legend all submitted factual evidence to DOT should also have put Fort Worth on notice that it could submit its own factual evidence.

We also note the absence of anything in the record to indicate that Fort Worth possesses any information bearing on the impact of increased service at Love Field. Fort Worth has had three opportunities to present or identify such evidence--during the comment period, in its motion for reconsideration, and in its brief on appeal--but has not demonstrated that it possesses relevant factual information not considered by DOT. This continued failure to identify the evidence it would have submitted indicates that Fort Worth was not prejudiced by any inadequacy in DOT's notice. *See* 5 U.S.C. § 706 (in reviewing an agency determination, "due account shall be taken of the rule of prejudicial error"); *Friends of Iwo Jima v. Nat'l Capital*

Planning Comm'n, 176 F.3d 768, 774 (4th Cir. 1999) ("Moreover, the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial.").

We also reject the DFW Board's argument that DOT's order amounts to a substantive rule subject to the notice and comment provision of § 553. Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy. See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294, 94 S. Ct. 1757, 1771, 40 L.Ed.2d 134 (1974); *Mobil Exploration and Producing North America, Inc. v. FERC*, 881 F.2d 193, 198 (5th Cir. 1989) (citing Bell Aerospace). In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action. We also accord significant deference to an agency's characterization of its own action. *See British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1978) ("In the present case we have, moreover, the Board's own assertion that its order is purely interpretive, and this contention in itself is entitled to a significant degree of credence.... While declaratory orders differ in some respects from interpretive rules, the same rationale should apply equally to an agency's characterization of one of its rulings as a declaratory order."). Since the APA defines "adjudication" as the "agency process for formulating an order," 5 U.S.C. § 551(7), and DOT classifies its ruling as a declaratory order, we find that the agency engaged in adjudication rather than rulemaking. Furthermore, because DOT's order interpreted the rights of a small number of parties properly before it, DOT did not abuse its discretion by acting through an adjudicatory proceeding. *See British Caledonian Airways*, 584 F.2d at 992-94; Mobil Exploration, 881 F.2d at 199 (finding no abuse of discretion where, inter alia, an agency proceeded by adjudication to resolve an issue affecting a small number of parties).

Fort Worth, joined by American, also argues that it was deprived of its right to a fair agency determination because of ex parte contacts between Continental Express, Legend, and DOT. Fort Worth cites specific instances when Continental Express and Legend officials contacted DOT about the pending state and federal court actions and asked DOT to intervene in these actions. The officials suggested specific actions which DOT could take and strongly advocated for DOT's intervention, including by characterizing the state court proceedings in unfavorable terms. DOT responded at one point with a written letter answering four questions posed by Continental. DOT and Legend do not dispute that the contacts took place, but they both argue that the contacts were proper and did not bias DOT's final decision.

DOT regulations prohibit certain ex parte contacts between agency personnel and interested parties.[4] *See* 14 C.F.R. § 300.2(a). Most of the contacts here fall outside these regulations because they occurred before DOT instituted its interpretation proceeding. See 14 C.F.R. § 300.2(a) ("[T]here shall be no substantive communication in either direction between any concerned DOT employee and any interested person outside DOT, concerning a public proceeding, until after final disposition of the proceeding.") (emphasis added); *id.* § 300.2(b)(4)(v) (defining a public proceeding as a "proceeding initiated by a docket filing, other than a petition for generally applicable rulemaking, after the filing in the docket of an

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[4] Fort Worth also relies on the APA ban on ex parte communications, but this ban does not apply here, because it does not cover informal adjudications. *See* 5 U.S.C. § 557(a), (d) (stating that the prohibition on ex parte contacts applies "when a hearing is required to be conducted in accordance with section 556 "); *id.* § 556 (governing formal hearings).

identifiable written opposition to the initiating document") (emphasis added). Additionally, most of the contacts, including those which occurred after DOT initiated its proceeding, did not involve the merits of the proceedings but rather were permissible requests to intervene in the state and federal action. *See Texas*, 866 F.2d at 1550 (finding that an individual's request for the Interstate Commerce Commission to intervene in a pending state action was not an ex parte communication because it did not involve the merits of the case).

B

The posture of the case presents more serious procedural concerns. DOT and the state court issued contrary rulings on some of the same issues in proceedings involving some of the same parties.[5]

Consequently, Fort Worth, the DFW Board, and American (collectively "Fort Worth petitioners") ask us to reverse DOT's action because (1) DOT violated the full faith and credit statute, 28 U.S.C. § 1738, by not granting preclusive effect to the prior state court ruling, and (2) DOT violated the Anti-Injunction Act and corresponding common law principles of federalism by issuing a declaratory order affecting a case currently pending before a state court. DOT rejected these arguments in its earlier

[5] Although the state and DOT proceedings overlapped, neither tribunal made significant efforts to accommodate the views of the other. The state court essentially gave DOT one month to issue its declaratory order and when DOT failed to do this, the state court ruled without the benefit of DOT's views. DOT, on the other hand, did not issue its declaratory order within the time set by the state court, did not attempt to intervene in the state court action even though some of the parties there asked it to intervene, and did not ask the state court to stay its ruling until DOT ruled on the same issues. Instead, DOT rejected the state court's view in its order, noting only the state court's lack of reasoning in support of its position.

rulings, but we do not defer to DOT's ruling on these issues. *See American Forest and Paper Ass'n*, 137 F.3d at 297.

I

The full faith and credit statute, 28 U.S.C. § 1738, generally requires federal courts to grant preclusive effect to state court judgments: "[t]he records and judicial proceedings of any court of any ... State .... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." *Id.* The plain language of this section establishes that it does not apply here: § 1738 applies only to "every court within the United States," and DOT is an agency, not a "court." Id. (emphasis added). The only other circuit to address fully this issue agrees with this reading of § 1738.[6] *See NLRB v. Yellow*

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[6] The Fort Worth petitioners rely on two district court cases which have arguably held to the contrary. *In Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), the court stated in passing that "[t]he Administrative agencies of the United States are no less bound that he [sic] courts of the United States to give full faith and credit to the decisions of the Courts of Puerto Rico." *Id.* at 4. The court did not cite § 1738, and thus it might have relied instead on the common law preclusion doctrines we discuss below. In *Midgett v. United States*, 221 Ct. Cl. 171, 603 F.2d 835 (Ct. Cl. 1979), the court cited Torres and stated: "Section 1738 of 28 U.S.C. imposes on a federal court presented with a state court judgment the same force and conclusive effect as it has in the state in which it is rendered. Administrative bodies of the United States as well as courts are required to adhere to this requirement." *Id.* at 845 (citation omitted). The court did not clearly indicate that it based its holding on § 1738, as opposed to merely analogizing to § 1738.

We cannot conclude with certainty whether these cases relied on § 1738. To the extent they did, we believe the better rule, for the reasons stated above and herein, is that § 1738 does not apply to agencies, but the rationale underlying § 1738 extends to agencies through common law preclusion doctrines. This rule is consonant with Supreme Court precedent and the

Freight Systems, Inc., 930 F.2d 316, 320 (3d Cir. 1991) (finding that the NLRB, by virtue of its status as an agency rather than a court, was not required to give full faith and credit to an earlier state court judgment); *cf. Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 n.5 (D.C. Cir. 1986) ("We agree with the FERC, though, that '[t]he fact that the state court ruled on the same issue, regardless whether its ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction.'").

The Supreme Court adopted this plain reading of § 1738 when presented with the question of whether a federal court must accord full faith and credit to an unreviewed state agency proceeding. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794, 106 S. Ct. 3220, 3224, 92 L.Ed.2d 635 (1986). Reading § 1738's references to "courts" as not including "agencies," the Elliott court concluded simply that " § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case." *Id.* at 794, 106 S. Ct. at 3224.

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plain text of § 1738, and it accounts for the concerns raised by the *Midgett* and *Torres* courts.

Fort Worth also argues that *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) addresses the question presented here. In *ITT Rayonier*, the Ninth Circuit held that the Environmental Protection Agency ("EPA") was bound by res judicata from pursuing an enforcement action when a prior enforcement action had been litigated in state court. *See id.* at 999-1004. The Ninth Circuit applied res judicata because it found that the EPA was in privity with the parallel state agency which had pursued the state enforcement action. *See id.* at 1002-04. *ITT Rayonier* is distinguishable from the present case, because Fort Worth has made no showing that DOT was in privity with any party in the state court action.

Finding that § 1738 does not apply to agencies does not end our inquiry, however, as courts "have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." *Id.* at 794, 106 S. Ct. at 3224. The Supreme Court fashioned such a rule in Elliott, requiring federal courts to grant preclusive effect to findings of fact by state agencies in most subsequent federal actions. *See id.* at 796-99, 106 S. Ct. at 3224- 26 (holding also that no preclusive effect should be given to state administrative agency factfinding in Title VII cases). To determine whether common law preclusion should apply here, we consider whether the policies favoring full faith and credit, including repose and federalism concerns, *See generally Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S. Ct. 411, 415, 66 L.Ed.2d 308 (1980) ("[R]es judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."), outweigh the federal interests present here, *See Midgett*, 603 F.2d at 845 ("A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court."); *cf. Yellow Freight*, 930 F.2d at 320 (discussing policy reasons why an agency should not be bound by § 1738). *See generally American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (suggesting, in dicta, that § 1738 can be trumped by "well-defined [competing] federal policies"); 18 Charles Alan Wright, et al., Federal Practice and Procedure § 4469, at 662-63 (1981) ("In various settings, federal courts have found that vital federal interests warrant rejection of the res judicata rules that state courts would apply to their own judgments.").

Applied here, the competing policy considerations weigh against requiring DOT to grant preclusive effect to the state

court proceeding.[7] Cf. Yellow Freight, 930 F.2d at 320-22 (holding that the NLRB was not bound by an earlier arbitrator's factfinding, even though the arbitrator's ruling was affirmed by a state court, because essential evidence was not presented to the arbitrator). First, the importance of repose here, while not insubstantial, is limited by the posture of this case. At the time the state court issued its ruling, parallel agency proceedings were already underway.

Second, this case involves aviation regulation, an area where federal concerns are preeminent and where DOT is charged with representing those concerns. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67, 114 S. Ct. 855, 863, 127 L.Ed.2d 183 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws...."); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303, 64 S. Ct. 950, 956, 88 L.Ed. 1283 (1944) (Jackson, J., concurring) ("Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive."), quoted in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34, 93 S. Ct. 1854, 1860, 36 L.Ed.2d 547 (1973); 49 U.S.C. § 46101(a)(2) (granting the Secretary of Transportation discretion to "conduct an investigation ... about ... any question that may arise under this part"). Additionally, this case involves the operation of flights from Love Field, a matter on which Congress has twice

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[7] Because we resolve the matter on these grounds, we do not reach DOT's alternative argument that the state court judgment should not be granted preclusive effect because a Texas court would not grant the judgment preclusive effect. *See generally Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374, 116 S. Ct. 873, 878, 134 L.Ed.2d 6 (1996) ("When faced with a state court judgment relating to an exclusively federal claim, a federal court must first look to the law of the rendering State to ascertain the effect of the judgment.").

specifically legislated. DOT's interpretive order is the first time that DOT, the agency specifically charged with administering the Wright Amendment, has interpreted the Shelby Amendment. *See Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991) (noting that "[t]he individual defendants in their official capacity, DOT, and DOT's Office of Aviation Analysis enforce the [Wright] amendment"); *State of Kansas v. United States*, 16 F.3d 436, 438 (D.C. Cir. 1994) (same). To allow the state court effectively to foreclose the administering agency from further consideration of the Shelby Amendment as to the parties which appeared before the state court would trump the key federal interests that motivated Congress to create DOT and give it authority over these laws.[8]

Finally, applying full faith and credit principles to DOT in this case would lead to inconsistent results. *Cf. Access Telecommunications v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (noting that the primary jurisdiction doctrine, under which courts refer matters to agencies when the matters are within agency jurisdiction, is motivated in part by the desire "to promote uniformity and consistency within the particular field of regulation"). Some of the parties before DOT are litigating these issues for the first time. Forcing DOT to grant preclusive effect to the state court ruling would lead to inconsistent application of the Shelby Amendment to the parties that did not appear before the state court.

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[8] These key federal interests are arguably lessened by the fact that DOT did not attempt to stay or intervene in the state court action; presumably if the federal interests were that important, DOT would have taken one of these actions. DOT's inaction is partially justified by the limited amount of time it had to intervene, as the state court only stayed the proceedings before it for one month.

In sum, because of the important federal interests here, we decline to hold that common law preclusion doctrines apply in this case. Instead, DOT properly declined to give preclusive effect to the state court judgment.[9]

2

The Fort Worth Petitioners also argue that DOT's actions violated the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. We "follow the weight of authority in holding that [i]f an injunction would be barred by § 2283, this

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[9] We reject the Fort Worth petitioners' invocation of the so-called *Rooker-Feldman* doctrine for the same reasons. "In a nutshell, the doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Matter of Reitnauer*, 152 F.3d 341, 343 (5th Cir. 1998) (applying the doctrine where "[t]he district court ... made apparent its displeasure with the manner in which the state court interpreted and applied state law [and] such displeasure formed the basis for its reversal of the bankruptcy court's order"). As we have previously noted, the *Rooker-Feldman* doctrine is "very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment." *Gauthier v. Continental Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987). Thus, we have not applied the *Rooker-Feldman* jurisdictional bar in cases where we have found it inappropriate to require a federal court to give full faith and credit to a state court judgment. *See id.* (not applying the *Rooker-Feldman* doctrine where full faith and credit does not apply because the state court judgment would not be entitled to preclusive effect under state law). We follow this practice here. The Fort Worth petitioners have not cited any cases where the *Rooker-Feldman* doctrine has been applied to an agency ruling on matters of federal law previously addressed by a state court. In light of the above-noted concerns, we *See* no reason to extend the doctrine to this context.

should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) (en banc) (quotation omitted) (alteration in original); see also *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993) ("[T]he district court may not consider the merits of the declaratory judgment action when 1) a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff, 2) the state case involves the same issues as those involved in the federal case, and 3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act.") (emphasis in original).

As a federal agency, DOT's proceedings are exempt from the terms of § 2283, which applies only to proceedings in a "court of the United States." 28 U.S.C. § 2283; *see also id.* § 451 ("As used in this title [,] [t]he term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."). Further, even where an action is ongoing in a "court of the United States," an agency's presence as a party, together with the federal interest the agency represents, can trump the application of § 2283. *See Mitchum v. Foster*, 407 U.S. 225, 235-36, 92 S. Ct. 2151, 2158-59, 32 L.Ed.2d 705 (1972) ("[A] third exception [to § 2283], more recently developed permits a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting 'superior federal interests.' "); *Texas v. United States*, 837 F.2d 184, 186 (5th Cir. 1988) ("Moreover, because a federal agency seeks the injunction, the ICC's motion is not directly precluded by the strictly enforced rule of the Anti-Injunction Act, 28 U.S.C.

§ 2283."); *United States v. Lemaire*, 826 F.2d 387, 388 n.2 (5th Cir. 1987) ("The Act does not prevent the United States, or one of its agencies, from acting to protect a federal interest."). Thus, § 2283 does not restrict our ability to review the agency's decision.

Fort Worth's authority to the contrary is unavailing. The case before us is clearly distinguishable from *United Credit Bureau of America, Inc. v. NLRB*, 454 U.S. 994, 102 S. Ct. 539, 70 L.Ed.2d 404 (1981) (Rehnquist, J., dissenting from denial of certiorari), where then-Justice Rehnquist dissented from the denial of certiorari to argue that "the concerns of federalism and comity comprehended by the Anti-Injunction Act should ... apply to the NLRB." *Id.* at 997-98, 102 S. Ct. at 541.[10] In United Credit, the NLRB ordered a party to dismiss a state court action. It did this without "consider [ing] whether the state-court proceeding interfered with its ability to consider or dispose of [the agency petitioner's] charges." *United Credit*, 454 U.S. at 998, 102 S. Ct. at 541 (noting that the state court had not yet acted). Here, the state court action, at least at the trial level, was completed, thus lessening DOT's intrusion and strengthening its reasons for issuing its own interpretation of the legal issues. Also, DOT's interest here is not its interest in resolving an individual petitioner's claim, as in United Credit, but rather its interest in avoiding piecemeal application of a federal aviation statute.

Additionally, we do not believe that DOT violated general principles of federalism by issuing its ruling. Although the Fort Worth Petitioners correctly note that state courts are competent to resolve matters of federal law, this does not prevent federal

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[10] We note in passing that, as a denial of a petition for certiorari, the *United Credit Bureau* opinion is not binding authority. *See Teague v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 1067, 103 L.Ed.2d 334 (1989).

agencies from acting within their authority to protect federal interests. Accordingly, the cases that the Fort Worth Petitioners cite in support of their federalism arguments are clearly distinguishable. *See, e.g., Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 339 (5th Cir. 1999) (holding that a district court properly remanded a state law claim after dismissing federal claims, even though one of the state law claims involved a preemption defense, because "state courts, being of equal dignity with federal courts, are equally competent to address that potential defense").

C

As a final procedural objection, the Committee argues that DOT improperly ruled without first preparing an environmental impact statement ("EIS"). The National Environmental Policy Act ("NEPA") directs "all agencies of the Federal Government ... [to] include [an EIS] in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). DOT found that it did not need to prepare an EIS, but because it is not charged with administering NEPA, its decision to not prepare an EIS is not entitled to deference. *See American Forest and Paper Ass'n*, 137 F.3d at 297.

The Committee argues that DOT's "decision" to allow increased flights constitutes a "major Federal action" under NEPA. We disagree. Agency decisions which "do not entail the exercise of significant discretion" do not require an EIS. *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1344-45 (5th Cir. 1979). By enacting the Shelby Amendment, Congress, not DOT, made the decision to allow additional flights at Love Field. DOT merely issued an interpretation of federal law that it was required to adopt under

the relevant statutes.[11] *See Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992) ("Other Circuits have held that when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA."); *Goos v. ICC*, 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC has not been granted any discretion under section 1247(d) to base its issuance of an NITU or CITU on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision...."); *Milo Community Hospital v. Weinberger*, 525 F.2d 144, 147 (1st Cir. 1975) (finding that no EIS was necessary where "consideration of the factors that the appellant has characterized as 'environmental considerations' could not have changed the Secretary's decision").[12]

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[11] For example, 49 U.S.C. § 41713, which DOT interpreted here, does not grant DOT discretion because Congress has defined the extent of federal preemption and has specified which state rights remain. On the other hand, when DOT applies § 41714(c), governing the award of slots to new entrants, DOT is clearly granted discretion by the statute. *See* 49 U.S.C. § 41714(c) ("If the Secretary *finds it to be in the public interest and the circumstances to be exceptional*, the Secretary *may* by order grant exemptions from the requirements under subparts K and S of part 93 of title 14, Code of Federal Regulations, to enable new entrant air carriers to provide air transportation at high density airports.") (parentheticals omitted and emphasis added). Thus, when applying § 41714, DOT follows NEPA. *See, e.g., Applications of Trans States Airlines, Inc.*, DOT Order 98-4-21, 1998 DOT Av. LEXIS 159, at *54-*55 (1998) (conducting an environmental assessment in a § 41714 determination).

[12] The Committee also argues that DOT failed to follow its own environmental procedures. The Committee relies on an FAA statement of "Polices and Procedures on Considering Environmental Impacts" which, as DOT notes, is inapplicable here because it "establishes Federal Aviation Administration (FAA) policies and procedures." DOT was not acting under the auspices of the FAA in this case. Instead, DOT asserts that the relevant

IV

The Declaratory Order stated that DOT intended to rule on four "federal law issues." DOT's subsequent Procedural Order added a fifth legal issue to the agency's docket. We review each of DOT's rulings in turn.

A

We first turn to DOT's ruling that the preemption provision of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), preempted Dallas's and Fort Worth's obligations under the Ordinance. In reaching this decision, DOT also determined that Dallas's rights as the proprietor of Love Field did not permit it to bar airlines from operating the services authorized under the Shelby Amendment. On appeal, the Fort Worth Petitioners argue that the power to restrict services at Love Field falls within Dallas's rights as proprietor of the airport. Thus, they argue, Dallas has an existing contractual obligation to restrict service at Love Field so as to block airlines from operating the services permitted under the Shelby Amendment.

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The ADA includes an express preemption provision, § 41713(b)(1), which generally prohibits states from enacting or enforcing a law or regulation "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). At the same

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DOT guidelines still require major agency action before undertaking an EIS, and we agree. *See* 44 Fed. Reg. 56420, 56424 (1979) ("An EIS shall be prepared for any proposed major Federal action significantly affecting the environment."); *see also id.* (requiring an environmental assessment when "a decision has not been make [*sic*] to prepare an EIS," but noting that the environmental assessment describes "the environmental impacts of a proposed action"). The Committee does not cite any contrary authority in its reply brief.

time, the ADA reserves the state's authority to carry out its "proprietary powers and rights." 49 U.S.C. § 41713(b)(3) (hereinafter, the "proprietary powers exception").

The proper standard of review to apply to DOT's preemption determination is the subject of extensive debate and briefing among the parties. It is also an issue of first impression before us. The Fort Worth Petitioners contend that DOT's interpretation of the proprietary powers exception should be afforded no deference because DOT lacks both the authority and the expertise to interpret this section of the ADA. DOT, Dallas, and Continental Express argue that DOT's general authority to administer the ADA inherently includes the power to administer the statute's preemption provision. Consequently, they argue for deferential review of DOT's preemption determination under Chevron.

The Fort Worth Petitioners present several strong arguments in favor of de novo review. A preemption determination does indeed involve legal determinations, which are arguably more within the expertise of the courts. *See Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991) (adopting a de novo standard of review because "[a] preemption determination involves matters of law--an area more within the expertise of courts than within the expertise of the Secretary of Transportation"). In reaching its decision, DOT interpreted existing case law, a role more typically--and perhaps more appropriately--left to the courts. Beyond this, the task of defining what constitutes a "proprietary power" has traditionally been left to the courts. *See*, e.g., *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (2d Cir. 1998) (assessing the validity of restrictions on operation at a heliport). Additionally, Congress appears to have evinced an intent to codify the proprietary rights existing when the ADA was enacted rather than an intent to allow DOT to define proprietary rights. *Cf. Western Air Lines v. Port Authority of New York and*

New Jersey, 658 F. Supp. 952, 956 (S.D.N.Y. 1986) ("The legislative history of Section 1305(b)(1) indicates that the airport proprietor would be permitted to take those actions 'presently accepted as valid exercises of proprietary powers.' ") (internal citation omitted).

DOT, however, presents strong arguments supporting the contrary position. DOT is charged with administering the aviation laws as a whole. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67, 114 S. Ct. 855, 127 L.Ed.2d 183 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws...."). More significantly, DOT is the "superintending agency" with respect to the administration of the ADA. *See American Airlines v. Wolens*, 513 U.S. 219, 229 n.6, 115 S. Ct. 817 n.6, 824, 130 L.Ed.2d 715 (1995). The First Circuit has come close to holding that this power encompasses the authority to interpret the preemption section of the ADA. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 167 (1st Cir. 1989) (finding that DOT was one of "two judicial actors with apparent jurisdiction over the [preemption] subject matter which they decided"). Absent any clear evidence to the contrary, we are nearly persuaded that DOT possesses the authority to interpret the preemption provision of the ADA and that, consequently, we should defer to its interpretation of that provision. *See Texas Oil & Gas Ass'n*, 161 F.3d at 937. We need not, however, make this final determination here. Because we conclude that DOT's ruling that § 41713 of the ADA preempted the Ordinance was correct under either standard of review, we decline to decide this issue at this time.

2

Congress passed the ADA in 1978 in an effort both to end federal economic regulation of commercial aviation and to promote competition within the airline industry. Fearful that in

the face of federal deregulation, states would enact conflicting laws regulating the airline industry, Congress enacted § 41713(b)(1) of the ADA, which provides that:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1); See also *New England Legal Foundation*, 883 F.2d at 173 ("In reducing federal economic regulation of the field ... Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."). When enacting the ADA, however, Congress also recognized that airport proprietors--the majority of which are municipalities, See City of Burbank, 411 U.S. at 635, 93 S. Ct. at 1860--were best equipped to handle local problems arising at and around their facilities. Accordingly, the ADA provides that the preemptive effect of § 41713(b)(1) does "not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport ... from carrying out its proprietary powers and rights." 49 U.S.C.A. § 41713(b)(3).

The restrictions on service at Love Field under the Ordinance appear to operate as limitations "relating to ... routes" within the meaning of § 41713(b)(1), *See Western Air Lines*, 658 F. Supp. at 952 (finding that a perimeter rule "relat[ed] to routes"), and the parties present no significant argument to the contrary. Consequently, the only issue before us is whether the power to enforce the restrictions falls within the proprietary powers exception. The Fort Worth petitioners contend that the

restrictions on service at Love Field fall within Dallas's proprietary powers.

The precise scope of an airport owner's proprietary powers has not been clearly articulated by any court. *See, e.g., id.* at 956 ("The extent of 'proprietary powers and rights' has not yet been established."). However, several courts have examined when an airport owner's enactment of a "perimeter rule"[13] or similar route restriction falls within the proprietary powers exception. These courts have recognized that local proprietors play an "extremely limited" role in the regulation of aviation. See, e.g., *id.* at 956 ("[A]irport proprietors have an 'extremely limited role' in the system of aviation regulation ....") (quoting *British Airways Bd. v. Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977)). In defining the permissible scope of a proprietor's power to regulate under § 41713(b)(3), federal courts have repeatedly held that an airport proprietor can issue only "reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest." *Id.* at 958; *see also National Helicopter Corp. of America*, 137 F.3d at 88-89 (limiting the permissible subject matter of local regulations to "aircraft noise and other environmental concerns at the local level"); *British Airways*, 558 F.2d at 84 (stating that a proprietor "is vested only with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs."); *cf. City and*

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[13] An airport perimeter rule "establish[es] maximum permissible distances of non-stop flights into and out of a given airport." *See Jonathan Whitman Cross, Airport Perimeter Rules: An Exception to Federal Preemption*, 17 Transp. L.J. 101, 102 (1988). The Wright Amendment itself, by allowing interstate service to only the four states bordering on Texas, operates as a perimeter rule. Similarly, because § 9.5 of the Bond Ordinance has been enforced so as to allow the range of flights permitted under the Wright Amendment, it effectively operates as a perimeter rule.

County of San Francisco v. FAA, 942 F.2d 1391, 1394 (9th Cir. 1990) ("Congress made it clear, however, that the power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory.").

Courts applying this standard have upheld route restrictions as within proprietary powers when they are targeted at advancing a specific local interest. To date, courts have permitted airport proprietors to enact regulations aimed at monitoring noise levels, *See Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981), tempering environmental concerns, *See National Helicopter of America*, 137 F.3d at 88, and managing congestion, *see Western Air Lines Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987). *See generally* Cross, 17 Transp. L.J. at 106 ("An airport authority's proprietary function permits it to enact regulations benefitting citizens who live near the airport, such as airport noise regulations or airport curfews."). In each of these cases, the proposed restriction was targeted at alleviating an existing problem at the airport or in the surrounding neighborhood. For example, in Western Air Lines, the Second Circuit upheld a 1,500-mile perimeter rule enacted by the Port Authority at LaGuardia Airport as a reasonable means both of alleviating congestion at LaGuardia and of preserving the shorthaul status of that facility. *See Western Air Lines*, 817 F.2d at 226. More recently, the Second Circuit considered the validity of a special use permit that imposed significant restrictions on the use of a local heliport. *See National Helicopter Corp.* 137 F.3d 81. Finding that the proprietor exception allowed municipalities only to promulgate " 'reasonable, nonarbitrary and non- discriminatory' regulations of noise and other environmental concerns at the local level," *id.* at 88, the Second Circuit upheld only the restrictions that were aimed at reducing noise or other environmental concerns at the

heliport. Significantly, the court struck down the restriction on sightseeing routes, finding that "Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." Id. at 92.[14]

The only case which might support the Fort Worth Petitioners' view of Dallas's proprietary powers at Love Field is *Arapahoe County Public Airport v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo.1998). To the extent that Arapahoe holds that it is within an airport owner's proprietary powers to restrict service at a local airport without articulating a viable purpose for the restriction, we view that case as deviating from the generally accepted rule that we adopt here. In Arapahoe, the Colorado Supreme Court--without finding any purpose for the restriction beyond the proprietor's bald assertion that it would "strip" the airport Authority "of its ability and authority to manage the Airport," *see id.* at 591--upheld a municipal proprietor's ban on all passenger service at Centennial Airport, see *id.* at 595. We fear that under the rationale of Arapahoe, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception. This would

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[14]In *City of Houston*, we touched upon the proprietary rights exception when we upheld the FAA's authority to enact a 1,000-mile perimeter rule at Washington National Airport. In that case, the FAA enacted the rule as a means of limiting traffic at National, preserving the short-haul status of National, and assuring the utilization of the flagging Dulles Airport nearby. In relying on *City of Houston* for support, the Fort Worth Petitioners overlook the fact that we explicitly avoided engaging in a full analysis of the preemption provision in that case. Rather, we found that since the ADA preempted *state* regulation of routes, the restrictions of § 41713 did not apply to the FAA, a branch of the federal government. Thus, our decision in *City of Houston* does little to advance the Fort Worth Petitioners' argument.

expand the regulatory role of municipal owners far beyond the "extremely limited role" envisioned by the ADA.[15]

We are not persuaded by the Fort Worth Petitioners' attempt to fit the restrictions at Love Field into the existing federal case law defining the scope of proprietary rights. On its face, the Ordinance is clearly not aimed at alleviating noise, pollution, or congestion at Love Field, nor do the Fort Worth Petitioners assert such claims. Rather, they extract from Western Air Lines and City of Houston an overly broad rule that it is within an airport owner's proprietary powers to allocate traffic between two airports so as to preserve the shorthaul nature of one facility. Such a contention misses the import of both cases; that a proprietor can enact a perimeter rule if it articulates a need for the restriction. The Fort Worth Petitioners seem to overlook the Western Air Lines court's repeated emphasis that the primary goal of the restriction was to reduce congestion at LaGuardia, and the allocation of traffic between LaGuardia and Kennedy Airports was a means of attaining this goal. The court specifically held that "a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the

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[15] *Arapahoe* is also factually distinguishable from the present case. First, while in *Arapahoe*, the court found that the ban on passenger service did not constitute a restriction on "rates, routes or services" within the meaning of the ADA, the restrictions under the Ordinance clearly amount to route restrictions. Second, the passenger service at issue in *Arapahoe* had never been permitted at Centennial Airport. In reaching its conclusion, the court emphasized that "[t]he power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated." *Arapahoe*, 956 P.2d at 595. In contrast, passenger flights on planes of all sizes have long been permitted at Love Field.

local proprietor." *Western Air Lines*, 658 F. Supp. at 958. Similarly, to the extent that City of Houston touched upon the scope of proprietary powers, we spent the bulk of our opinion emphasizing the fact that allocation of flights between Dulles and National was necessary to encourage use of Dulles Airport and ameliorate the overuse of National. *See City of Houston*, 679 F.2d at 1187. In neither case was re-allocation of flights between airports a goal in and of itself.

The fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive of this issue. We do not limit the scope of proprietary rights to those which have been previously recognized. *Cf. Western Air Lines*, 658 F. Supp. at 957 ("Section 1304(b)(1) [recodified as 41713(b)(1)] does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind."). Thus, we are open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under § 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exception beyond its intended limited reach.[16]

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[16] Finally, we need not reach the question of whether there is a "multi-airport proprietor" requirement in either the case law or the ADA such that a local proprietor can only enact route restrictions that allocate between two airports if it owns both facilities. Since we find that the restrictions at issue here are impermissible regardless of ownership, the issue of whether Dallas controls both Love Field and DFW is irrelevant to our analysis.

In sum, reviewing DOT's ruling de novo, we affirm the agency's determination that § 41713(b)(1) of the ADA preempted the Ordinance's restrictions on operations at Love Field. Clearly, under the less stringent Chevron review, DOT's interpretation of the preemption provision would also be reasonable. Under either standard, DOT's interpretation is affirmed.[17]

B

We next review DOT's ruling that the Wright Amendment's "commuter aircraft exemption" authorized carriers using jets with passenger capacity of 56 seats or less to engage in long-haul service from Love Field to any city in the United States. DOT ruled and argues on appeal that the "commuter aircraft exemption" imposes no geographical limitation on the service that can be provided with smaller aircrafts and therefore authorizes longhaul service at Love Field with any aircraft with a capacity of less than 57 passengers. Not surprisingly, intervenors Continental Express and Legend Airlines--each of whom plan to offer longhaul service out of Love Field on regional or reconfigured jets--agree with this position. The Fort Worth Petitioners contend that DOT misinterpreted the Love Field amendments and that the exemption authorizes only short-haul service at Love Field.

Because the DOT is authorized to administer the Wright and Shelby Amendments, *see Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1449 (5th Cir. 1988) ("Here, Congress fashioned a specific provision which the agency (once CAB,

[17] DOT alternatively ruled that the Wright and Shelby Amendments impliedly preempt the cities' ability to enforce the Ordinance. Because we find that the amendments expressly preempt enforcement of the Ordinance, we decline to address this issue here.

now DOT) has been called upon to interpret."), we review its decision under the two-step Chevron analysis.

This inquiry most logically begins with a review of the statutory text. Subsection (a)(2) of the Wright Amendment exempts from the general ban against interstate flights at Love Field "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." § 29, 94 Stat. at 48. Section (a) of the Shelby Amendment defines the term "passenger capacity of 56 passengers or less" to include "any aircraft ... reconfigured to accommodate 56 passengers or fewer if the total number of passenger seats installed on the aircraft does not exceed 56." § 377(a), 111 Stat. at 1447. A plain reading of these provisions appears to permit longhaul service at Love Field on a commuter airline with a passenger capacity of fewer than 57.[18]

The slightly more complicated issue here is what type of aircraft is covered under the "commuter airline" exemption. DOT interpreted the commuter airline exemption as applying to any aircraft--whether a "regional jet" or turboprop plane--with a capacity of 56 passengers or less. Legend and Continental Express agree with this interpretation. The Fort Worth Petitioners, on the other hand, argue that the exemption in subparagraph (a)(2) of the Wright Amendment applies only to "commuter aircrafts" and not to regional jets. These differing views, in addition to Congress's failure to define the term

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[18] In interpreting the commuter airline exemption in this manner, we keep in mind that Congress enacted the Love Field amendments with the intention of preserving Love Field as a primarily shorthaul facility. *Cf. Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991). We are, however, persuaded by DOT's argument that this interpretation will not undermine Love Field's status as a primarily short-haul airport since both the Wright and Shelby Amendments still place significant restrictions on the long-haul service permitted on larger jets.

"commuter airline," persuade us that the meaning of that term is ambiguous. *See Continental Air Lines*, 843 F.2d at 1454 ("The language of the [commuter airline exemption] is, we are persuaded, ambiguous."). Consequently, we turn to step two of Chevron and assess the reasonableness of DOT's interpretation.

The Fort Worth Petitioners contend that DOT erred in failing to interpret the phrase "commuter airline" as a limitation on the commuter aircraft exemption. As an initial matter, to the extent that American attempts to resurrect the argument that the term "commuter airlines" cannot refer to an air carrier offering longhaul service, we agree with and adopt the rationale of the District of Columbia Circuit in Continental Air Lines. In that case, the court upheld as reasonable DOT's interpretation of the commuter airlines exemption as restricting the type of aircraft that could operate unrestricted service at Love Field rather than the class of airlines that could operate longhaul services at the facility. *See id.* at 1454-55.

Fort Worth presents a different argument, namely, that the term "commuter" limits the type of aircraft to the kind of turboprop aircrafts that were in use at the time the Wright Amendment was enacted. Regional jets, it contends, "cannot qualify as 'commuter' aircraft." We disagree. First, Congress chose not to define "commuter airline" by reference to the kind of planes with a limited passenger capacity in 1979 and we decline to define that term for it here. *Cf. Continental*, 843 F.2d at 1454 ("First, Congress might have defined 'commuter airlines' with greater specificity by explicitly incorporating definitional references to agency regulations, but it chose not to do so. We cannot say that Congress meant to incorporate those regulatory definitions absent indications of its intention to do so in the statute or the legislative history."). Furthermore, to impose such a definition would essentially penalize those

airlines who chose to update their technology as the airline industry advanced over the past twenty years.

Second, the Fort Worth Petitioners' definition of a "commuter airline" essentially renders the Shelby Amendment meaningless. The City of Fort Worth's contention that "the Shelby Amendment merely permits the use of reconfigured jet aircraft if the aircraft otherwise qualifies as a commuter aircraft" is nonsensical since, under its own definition of a "commuter airline," a reconfigured jet would never qualify as a commuter plane.[19] The more rational view is that the term "operating aircraft with a passenger capacity of 56 passengers or less" as defined by the Shelby Amendment, defines the term "commuter airlines" so as to include all planes weighing less than 300,000 pounds, including regional jets, with a passenger capacity of less than 57. Thus, our reading of the commuter aircraft exemption leads us to conclude that DOT's interpretation of the commuter aircraft exemption as permitting carriers using jets with a 56-passenger capacity to engage in longhaul service at Love Field is reasonable.

C

DOT found that, "[f]or the same reasons [the cities could not directly limit services from Love Field], the DFW Board may not prohibit or limit an airline's use of a competing airport" through the use agreements. DOT Order 98-12-27 at 52.

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[19] The Fort Worth Petitioners also argue that DOT's interpretation violates the agency's previous ruling that Congress enacted the Wright Amendment in an effort to limit operations at Love Field to shorthaul service. In reality, Congress always permitted limited longhaul service at Love Field. From its inception, the Wright Amendment allowed for limited longhaul service on aircrafts with limited capacity and, as stated above, we do not think that DOT's ruling will radically alter Love Field's status as a primarily shorthaul airport.

Continental Express agrees with this ruling,[20] while the DFW Board, Dallas, and Fort Worth argue that the use agreements are not preempted. We again need not decide whether we must defer to DOT's ruling on this point because we would uphold it even if we reviewed it de novo.

In determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity--actions similar to those a private entity might take--and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is. For example, in *Building & Trades Council v. Associated Builders*, 507 U.S. 218, 226, 113 S. Ct. 1190, 122 L.Ed.2d 565 (1993), the Supreme Court held that a labor contract was not preempted by the National Labor Relations Act because it was not "government regulation" but rather "constitute[d] proprietary conduct." *Id.* at 232, 113 S. Ct. at 1199. More recently, in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999), we considered whether a municipal ordinance and a contract entered into pursuant to that ordinance were preempted as "law[s], regulation[s], or other provision[s] having the force and effect of law." *Id.* at 691. Analyzing the contract and the ordinance in the same manner, we held that neither was preempted because both

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[20] American filed a request to intervene and a request to file an intervenor's brief that conditionally supports DOT's ruling on the use agreement issue. Legend subsequently moved to strike American's proposed intervenor brief. American's request to intervene is untimely, *see* Fed. R.App. P. 15(d), and American has not shown that we should treat its proposed intervenor brief as a supplemental brief under 5th Circuit Local Rule 28.5. Accordingly, we DENY American's motions to intervene and to file a brief as an intervenor and DENY as moot Legend's motion to strike American's intervenor brief.

were valid exercises of proprietary power rather than impermissible attempts to regulate. *See id.* at 693-94; *see also Associated Gen. Contractors of America v. Metropolitan Water Dist. of S. Cal.*, 159 F.3d 1178, 1182-83 (9th Cir. 1998) (holding that labor contracts between a state entity and private groups were not "laws" because they were not efforts to regulate but rather "reflect[ed] an owner's desire to contractually assure peace and prosperity on particular projects").

Thus, the critical inquiry here is whether the use agreements represent a valid exercise of the cities' proprietary powers. This question is easily resolved. The use agreements are essentially coextensive with the Ordinance, indicating in their breadth an intent to achieve everything achieved by the Ordinance. *Cf. Cardinal Towing*, 180 F.3d at 694 (looking to the scope of the contract and the activity it covered to determine whether it represented an attempt to regulate). They were enacted to effect the Ordinance, and the most recent version of the agreements directly links the airlines' obligations to the terms of the Ordinance: "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth areas to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance."[21] Given this overlap, for the same reasons we have already determined that the Ordinance is preempted as an improper attempt to regulate, we must determine that the use agreements are preempted as an impermissible attempt to regulate in an area where the federal government has preempted state regulation.[22]

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[21] Earlier versions of the use agreements and the original letter agreements contain similar language.

[22] Thus, this case is distinguishable from the Supreme Court's recent decision in *Wolens*, where the Court addressed a class action by passengers against an airline over changes the airline made to its air- miles program. *See Wolens*, 513 U.S. at 224-25, 115 S. Ct. at 822. The Court first found that

See Skydiving Center of Greater Washington, D.C., Inc. v. St. Mary's County Airport Comm'n, 823 F. Supp. 1273, 1284 (D. Md. 1993) (finding that when federal law preempted a municipal corporation's ban on off-site parachute landings, it also preempted lease provisions between the corporation and the skydiving center that incorporated this ban by reference).

The parties favoring the use agreements contend that even if the use agreements were preempted, the signatories waived their preemption rights by voluntarily entering into the agreements. DOT rejected this argument by finding that any waiver was invalid as violative of public policy. *See, e.g., Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 702-04, 65 S. Ct. 895, 900-01, 89

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the passengers' state consumer protection act claims were preempted by federal law, because their claims related to "rates" and "services." *See id.* at 228, 115 S. Ct. at 823-24. The Court proceeded to find, however, that the plaintiffs could still pursue contractual claims against the airlines because, unlike the consumer protection statute, the contracts were "privately ordered obligations" which "did not amount to a State's enact[ment] or enforce[ment] [of] any law." *Id.* at 228-29, 115 S. Ct. at 824 (quotations omitted) (alterations in original). It based this finding in part on the fact that "[m]arket efficiency requires effective means to enforce private agreements." *Id.* at 230, 115 S. Ct. at 824.

As several of the parties note, *Wolens* is distinguishable from this case because it did not involve a contract entered into by a state. Instead, the contracting parties in *Wolens* were private actors. Thus, the only question of state regulation in *Wolens* was the more tangential question of whether the contract could be enforced in state court. *See id.* at 229 n.5, 115 S. Ct. at 824 n.5.

Additionally, although *Wolens* referred to the importance of contracts in ensuring "market efficiency," there has been no convincing showing here that the parties entered into the use agreements for this purpose. Instead, it seems that they entered into the use agreements to implement an agreement between the cities to regulate airport use in the Dallas-Fort Worth area.

L.Ed. 1296 (1945) (noting "that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," and holding that in the case before it, employees could not waive their private rights to liquidated damages because of the public interest at stake).

We need not address the waiver issue because we find it inapplicable here. Section 41713 does not expressly announce affirmative rights for airlines, but instead bars states from regulating in certain areas. The airline signatories cannot "waive" this preemption because there is no indication that the federal preemption is limited to granting them individual rights. *Cf. Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769, 771 (E.D. Tenn. 1975) (holding, without analysis, that "[t]he lease indenture of June 16, 1969 between American and the authority violates 49 U.S.C. § 1349(a), a statute enacted for the protection of the public, in so far as it grants American the exclusive right for the use of the landing area and the air navigation facility at the airport").

D

Finally, we review DOT's ruling that the Wright Amendment permits an airline to offer through service from Love Field to points outside the Love Field service area as long as the airline uses a city within Texas as a connecting point and a 56-passenger aircraft to get to that point.[23] While DOT,

[23] As an initial matter, we clarify the precise issue addressed in DOT's Declaratory Order. DOT purportedly determined "[w]hether the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city *within the seven-state area* as a connecting point and uses aircraft with no more than 56 seats for its flights

Continental Express, and Legend Airlines argue that we should uphold this ruling, every other party to this action--Dallas, Fort Worth, the DFW Board, Southwest Airlines, and American Airlines--contends that permitting an airline to offer through service between Love Field and "the world" violates both the plain meaning of and the congressional intent behind the Wright Amendment. Once again, since DOT is charged with administering the Wright Amendment, we review its ruling under the two-step Chevron analysis. *See Texas Oil & Gas Ass'n,* 161 F.3d at 937-38.

This issue arose from Continental Express's decision to offer and advertise through service between Love Field and "the world." Continental Express flies passengers from Love Field to Houston's Intercontinental Airport on an aircraft with a maximum capacity of 56 passengers and then transfers them to worldwide flights on large jets. Passengers taking advantage of this service receive one ticket and, though they must change planes, do not have to reclaim and recheck their luggage at the connecting point.

As discussed above, subsection (a)(2) of the Wright Amendment excludes from section (a)'s general prohibition against interstate transportation flights out of Love Field that are operated on an aircraft with a capacity of 56 passengers or less. Subsection (c) of the Amendment permits flights between Love Field and any point in Texas or one of the four contiguous states

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between Love Field and the connecting point." Declaratory Order at 18 (emphasis added); *see also* DOT Procedural Order at 3 (Sept. 3, 1998). The substance of DOT's ruling, however, is geared towards the specific service offered by Continental Express and therefore considered solely whether the Love Field amendments permit an airline to offer through service through a point *within* Texas. We limit the scope of our review to the narrower question actually resolved by DOT.

(later expanded to seven) on any size aircraft as long as "(1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State." § 29, 94 Stat. at 48.

DOT interpreted subsection (a)(2) as authorizing the service offered by Continental Express. More specifically, DOT reads the commuter airlines exemption to exempt planes with a passenger capacity of less than 57 from all restrictions in the Wright Amendment. Under this interpretation, the restrictions on service in subsection (c)--including the restrictions on through service--do not apply to aircrafts operating under the commuter airline exemption. In contrast, the Fort Worth Petitioners, Southwest Airlines, and the City of Dallas contend that DOT's interpretation violates the plain language of the Wright Amendment. Under their interpretation of the statute, the restrictions on service in subsection (c)(2) apply to both commuter flights under subsection (a)(2) and flights on large aircrafts.

These two plausible yet conflicting readings of the relevant provisions of the Wright Amendment, coupled with a lack of legislative history illuminating the proper interaction between subsections (a)(2) and (c)(2), convince us that Congress did not speak directly to the issue before us. Accordingly, we move to step two of Chevron and inquire whether DOT's interpretation is a reasonable one. Under Chevron, an agency's interpretation is "reasonable" if it is "not patently inconsistent with the statutory scheme." *See Continental*, 843 F.2d at 1452 (citations omitted). We need not agree with DOT's interpretation in order to uphold it as reasonable. *See Exxon Corp. v. Lujan*, 970 F.2d 757, 761 (10th Cir. 1992) ("The agency's interpretation need not be the only one it could have adopted, or the one that this court would

have reached had the question initially arisen in a judicial proceeding.") (citation omitted).

We are persuaded that DOT's interpretation of the Wright Amendment is a permissible one within the meaning of Chevron. DOT grounds its ruling largely on the argument that by imposing an express restriction on through service on large jets operating under subsection (c)(2) but declining to impose a similar restriction on commuter planes operating under section (a)(2), Congress was evincing its intent to permit small aircrafts to fly without such a restriction.[24] We view this reading of the amendment as reasonable and not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some longhaul service. *See* H.R. Conf. Rep. 96-716, at 24 (1979), reprinted in 1980 U.S.C.C.A.N. 78, 86 (stating that the Wright Amendment "embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field").

This is not to say that we find DOT's interpretation to be the only or the best reading of the Wright Amendment. In order to

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[24] Each party opposing DOT's position argues that it conflicts with the agency's 1985 Order holding that Continental could not provide interlining service on a large jet through a connecting point in Texas. *See Love Field Amendment Proceeding, DOT Order 85-12-51*, 1985 WL 57886 (1985). In that interpretive proceeding, DOT addressed whether airlines could provide interlining service exclusively on large planes. There, DOT essentially agreed with an earlier CAB ruling that an air carrier could not "evade the [Wright] Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area." 1985 WL 57886, at * 11(citation omitted). We agree with DOT that its previous interpretation can be distinguished on the grounds that DOT premised its earlier order on an interpretation of section (c)(2) of the Wright Amendment, whereas the agency's decision here relies primarily on an interpretation of section (a).

reach its decision, DOT necessarily defined "air transportation on 56-passenger capacity planes" as including air service provided in part by such aircrafts. Similarly, it implicitly defined intrastate service as including flights with only an intrastate portion. These interpretations strain the meaning of both terms. Furthermore, we note with concern the potential impact of DOT's ruling. While it seems unlikely that permitting interstate service outside of the Love Field service area on small planes would have any impact on DFW's role as the Dallas area's primary long-haul facility, it seems significantly more likely that following the DOT ruling, airlines who already operate small aircrafts will commence interlining service connecting in Houston or another Texas airport. However, determinations of this nature are directly within DOT's expertise, not ours, and we will not substitute our judgment on aviation-related issues for their reasonable one. Accordingly, we affirm DOT's ruling as a reasonable interpretation of the Wright Amendment.

V

For the foregoing reasons, we DENY the petitions for review and AFFIRM DOT's orders.

APPENDIX B

Posted 12/22/98 Order 98-12-27

[LOGO] 6:00 P.M. SERVED December 23, 1998

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 22nd day of December, 1998

LOVE FIELD SERVICE INTERPRETATION
PROCEEDING
Docket OST-98-4363

DECLARATORY ORDER

The Cities of Dallas and Fort Worth agreed in 1968 to create Dallas-Fort Worth International Airport ("DFW") as the metropolitan area's primary airport. The two cities agreed to phase out service at their local airports, which included Love Field, owned and operated by the City of Dallas, and cause the airlines serving the area to use DFW for all interstate flights. The cities' goal of prohibiting all interstate service at Love Field conflicted with Southwest Airlines' plans to use the airport for interstate service. Congress therefore enacted a federal statute authorizing a limited amount of interstate service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) ("the Wright Amendment"). Last year Congress amended the Wright Amendment to authorize additional interstate service at Love Field. Section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment").

In response to Congress' enactment of the Shelby Amendment, Fort Worth filed a suit in the Texas state courts seeking to compel Dallas to block any airline from operating the additional types of service authorized by that statute. Fort Worth's filing led to additional litigation in the state and federal courts, including a declaratory judgment suit filed by Dallas against this Department and Fort Worth. In general, Fort Worth, joined by American Airlines and the DFW Board, contend that, under the cities' 1968 agreement, Dallas may allow airlines to operate only those Love Field services permitted by the Wright Amendment. Dallas, Continental Express, Southwest Airlines, and Legend Airlines (a proposed new entrant that plans to operate longhaul service from Love Field with aircraft reconfigured to hold no more than 56 seats) contend that the federal law overrides the cities' agreement and that Dallas must allow airlines to operate the additional services authorized by the Shelby Amendment.

The litigation led most of the parties to ask the Department to intervene in some manner in the dispute. The Department began this proceeding to issue an interpretation of the meaning of the relevant federal statutes in light of the parties' requests and the importance of the issues. Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. *See, e.g., Cramer v. Skinner,* 931 F.2d 1020, 1024 (5th Cir. 1991), *cert. denied,* 502 U.S. 907. The Department's issuance of an order addressing issues involving Love Field is not without precedent. The Department held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing *Love Field Amendment Proceeding,* Order 85-12-81 (December 31, 1985). The Court of Appeals affirmed the Department's interpretation of the Wright Amendment. *Continental Air Lines v. DOT,* 843 F.2d 1444 (D.C. Cir. 1988)

The Department has received comments and reply comments from all of the parties in the litigation, as well as several airport parties, the unions representing the pilots at American and Southwest, the Love Field Citizens Action Committee, and Delta Air Lines. In general, the parties in the litigation have taken the same position in their pleadings as they have in court. Fort Worth, American, and the DFW Board also urge the Department to dismiss this proceeding, while Dallas, Southwest, Continental Express, and Legend assert that the Department should issue a ruling on the federal law issues.

After considering all of the parties' arguments, the Department has concluded that it has the authority and responsibility to issue rulings on the federal law issues presented by the dispute over additional airline service at Love Field. The Department finds that the restrictions on Love Field service sought by Fort Worth, American Airlines, and the DFW Board are contrary to federal law and that the Wright and Shelby Amendments largely permit (i) unrestricted longhaul service with aircraft containing a passenger capacity of 56 passengers or less and (ii) flights with larger aircraft to cities in Kansas, Mississippi, and Alabama, as explained in this order. The Department is simultaneously issuing a separate order that addresses the parties' various procedural motions in this proceeding.

The Department's decision that Dallas may not block airlines from operating services authorized by the Shelby Amendment reflects Congress' intent in enacting the Wright and Shelby Amendments and follows earlier decisions by the courts and federal agencies interpreting the relevant federal statutes.

This decision is also consistent with the FAA's recent preliminary determination in an administrative proceeding that a Colorado airport may not prevent an airline from operating scheduled service when the airport allowed

comparable flight operations by other firms. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority*, FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (issued August 21, 1998).

The Department is not holding that Dallas has no authority to limit the level of operations at Love Field. Airport operators may not regulate airline routes, as Fort Worth seeks to do, but airport owners have authority to regulate most aspects of airport operations. The Department's interpretation here does not place in question the legitimate management rights of airport owners. The Department is also basing its decision on current circumstances. No one has tried to show in this proceeding that the additional services authorized by the Shelby Amendment could jeopardize DFW's role as the area's principal airport.

FACTUAL AND LEGAL BACKGROUND

The Cities' Agreement to Build DFW and Phase-Out Service at the Local Airports

The restrictions on Love Field service initially grew out of the two cities' settlement of a long-standing dispute over the Dallas-Fort Worth area's airline operations. For many years Dallas and Fort Worth operated separate airports (Love Field was the Dallas airport) and fought over which airport should be the metropolitan area's principal airport. The two cities resolved the dispute in the 1960s by agreeing to build DFW to replace their local airports and to end virtually all airline service at Love Field and Fort Worth's local airports. The cities' agreement resulted in large part from the threat by the Civil Aeronautics Board ("the Board") that it might consolidate all of the area's service at one of the local airports if the cities did not settle their dispute. *See City of Dallas, Texas v. South-west Airlines*, 371 F.Supp. 1015, 1019-1021 (N.D. Tex. 1973), *aff'd on different grounds*, 494 F.2d 773 (5th Cir. 1974).

Before the cities settled their dispute, Fort Worth's major airport was Greater Southwest International Airport, which was demolished as a result of DFW's construction. Fort Worth has another airport, Meacham Field, still useable by airlines. Love Field was the Dallas airport used by the scheduled airlines.

Each airline then serving Love Field under certificate authority granted by the Board agreed to operate all of its interstate service at DFW. *See City of Dallas, Texas, supra,* 371 F. Supp. at 1020-1021. Southwest, however, was operating intrastate flights under state authority and refused to move. Its refusal led to years of litigation, as described below.

The Wright Amendment has allowed Southwest to provide interstate service from Love Field and points in the four states bordering Texas. Despite Southwest's continuing use of Love Field for interstate service, DFW became the area's primary airport, as the cities desired, and has grown from 11.3 million enplaned passengers in 1979 to 60.5 million enplaned passengers in 1997. Continental Express Reply at 2.

Dallas and Fort Worth currently own DFW, which is managed by the DFW Board. The DFW Board is a local governmental body created and authorized under state law to be the owner and operator of DFW.

The Terms of the Bond Ordinance

As part of their agreement, the two cities jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"). Whether the Bond Ordinance limits Love Field service, and whether Dallas may enforce any such limitations, lie at the heart of the parties' current dispute. Exhibit 8 to the DFW Board's comments is a copy of the Bond Ordinance. The key provision is section 9.5, which obligated each city to move scheduled interstate services to DFW as far as "legally permissible." Section 9.5A sets forth the cities' obligation to transfer interstate airline services to DFW:

> It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA, and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport [DFWJ]. It is further acknowledged that and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

This section gives the DFW Board some authority to waive this restriction:

> From time to time hereafter, the [DFW Board] may review the effect and application of such covenant, and by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of public safety; (2) in the interest of prudent and efficient operations at [DFW]; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole.

The DFW Board may not grant such a waiver if doing so would substantially reduce DFW's revenues as defined in the agreement.

Related obligations are contained in Section 9.5B of the Bond Ordinance, which reads in part as follows:

> In addition to the covenant of the Cities contained in [paragraph 9.5A), the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the [DFW Board] will undertake with regard to the Regional Airport, Love Field, GSIA, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced or destroyed.

The Bond Ordinance's definition of "Certificated Air Carrier Services" includes (i) scheduled interstate services operated under certificate authority granted by the Board or any successor agency, (ii) scheduled services operated by foreign airlines under authority granted by the Board or any successor agency, and (iii) scheduled intrastate services operated under authority granted by the Texas Aeronautics Commission or any successor agency. The definition excludes services provided by "air taxis" under exemption authority granted by the Board or the Texas agency. Section 2.1G.

The Bond Ordinance by its terms does not prohibit all interstate service at Love Field. It conditions the cities' obligation to transfer services to DFW by requiring them to take that action "as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action)." As explained below, in the first round of litigation over Southwest's use of Love Field, the district court read the Bond Ordinance as requiring the phase-out of interstate service only insofar as permitted by law. *City of Dallas, supra,* 371 F. Supp. at 1019, 1035.

Southwest's Efforts to Use Love Field

After DFW opened, Dallas kept Love Field open for limited uses. When Southwest refused to move to DFW, Dallas, Fort Worth, and several competing airlines repeatedly tried to compel Southwest to stop using Love Field, primarily through litigation.

Dallas and others filed a suit in federal district court to force Southwest to move out of Love Field to DFW. In that case the district court held on several grounds that Dallas could not block Southwest from using Love Field. *City of Dallas, Texas v. Southwest Airlines, supra,* 371 F. Supp. at 1015. Among other things, the city's efforts to stop Southwest's service violated its obligation under federal law not to discriminate among airport users. 371 F. Supp. at 1028-1030. While the Bond Ordinance prohibited intrastate flights by airlines like Southwest operating under state authority, it allowed airlines operating under federal certificate authority to operate intrastate flights and allowed non-certificated commuter airlines to operate at Love Field. 371 F. Supp. at 1027-1028, 1031. The court additionally held that Dallas could not block Southwest from using Love Field when the Texas Aeronautics Commission had specifically authorized Southwest to operate intrastate flights from Love Field. 371 F. Supp. At 1032-1034. The court concluded that it did not

need to invalidate the Bond Ordinance provision requiring the phase-out of most scheduled service at Love Field, since that provision specifically obligated Dallas to take such action only to the extent that it was legally permissible. Dallas could not legally force Southwest to move to DFW. 371 F. Supp. at 1034-1035.

On appeal the Fifth Circuit affirmed the district court's holding that Dallas could not block Southwest from using Love Field when the Texas agency had specifically authorized Southwest to use that airport. *City of Dallas, Texas v. Southwest Airlines, supra,* 494 F.2d 773. The Fifth Circuit did not address the other grounds relied upon by the district court.

A second round of litigation resulted from Dallas' adoption of an ordinance imposing a $200 fine for each takeoff and landing by a commercial airline at Love Field. The district court enjoined Dallas from enforcing this ordinance. *See Southwest Airlines v. Texas International Airlines,* 396 F. Supp. 678, 680, 682 (N.D. Tex. 1975).

Several airlines that used DFW and competed with Southwest created a third round of litigation. After the Fifth Circuit held that Southwest was entitled to use Love Field, these airlines asked a state court to end Southwest's use of the airport. Their action caused the district court to enter an injunction barring any litigation that sought to overturn the court's decision that Southwest had the right to operate at Love Field. *Southwest Airlines v. Texas International Airlines,* 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd,* 546 F.2d 84 (5th Cir. 1977).

The district court later entered a permanent injunction, which, as described below, is the basis of Southwest's motion asking the court to enforce the injunction against Fort Worth (Exhibit 7 in Dallas' comments is a copy of the injunction). Southwest claimed that Fort Worth violated the injunction by suing Dallas and asking the state court to grant relief that would limit Southwest's Love Field flights.

The Enactment of the Wright Amendment

When the two cities built DFW, airline routes, rates, and services were extensively regulated by the Board. Southwest avoided Board regulation by operating as an intrastate airline. After Congress deregulated the airline industry in 1978, Southwest wished to begin interstate service. It applied for federal authority to serve the Love Field-New Orleans route under the so-called "automatic entry" provision in the deregulation act. Dallas, Fort Worth, and others opposed Southwest's application. The Board granted the application since it had no power to deny it. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979).

This Board decision led to Congress' enactment of the Wright Amendment limiting interstate passenger service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (the amendment has never been codified).

Congressman Jim Wright of Fort Worth offered an amendment to a bill deregulating international air transportation. His amendment, adopted by the House, would have prohibited all interstate service at Love Field (other than commuter airline operations), as demanded by Dallas and Fort Worth. *See* H.R. Rep. No. 96-716, 96th Cong., 1st Sess. (1979), at 24; exhibit 19 to the DFW Board's comments is a copy of the conference committee report. The Senate, however, refused to ban interstate service at Love Field. The conference committee created the Wright Amendment, which allowed a limited amount of interstate service at Love Field. *See* H.R. Rep. No. 96-716 at 24-26.

The Wright Amendment reads as follows:

> (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise

modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The amendment thus prohibited interstate scheduled passenger service at Love Field, subject to four exceptions. The three exceptions created by subsections (a) and (b) allowed (i) unrestricted service using aircraft seating no more than 56 passengers (we will refer, to this exception as the "commuter aircraft exemption"), (ii) ten charter flights per month, and (iii) the interstate services that existed on November 1, 1979. Subsection (c) additionally allowed airlines to operate Love Field flights to or from points in Texas, New Mexico, Oklahoma, Arkansas, and Louisiana ("the Love Field service area") but barred the sale of through transportation between the endpoint of such a Love Field flight and any point outside the Love Field service area. Thus, if a traveller wished to fly from Love Field to a point outside the Love Field service area, the traveller could transfer at the endpoint of a Love Field flight to another flight going to the point outside the Love Field service area, but the traveller had to buy a separate ticket for each flight and could not check his or her luggage through from Love Field to the final destination. *See Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 298.[1]

The conference committee report stated that this amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 96-716 at 24. The report further stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26.

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[1] The courts upheld the Constitutionality of the restrictions on Love Field service in *Cramer* and in *State of Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994).

As noted, the Bond Ordinance had prohibited all scheduled interstate service from Love Field except air taxi service, to the extent legally permissible. The Wright Amendment, on the other hand, allowed airlines to operate some interstate service. Dallas and Fort Worth, however, never amended the Bond Ordinance to reflect these changes. Thus the Bond Ordinance by its terms, as construed by Fort Worth, prohibits interstate services which may be operated (and which Southwest has been operating) under the Wright Amendment. *See* Dallas Reply at 12. In addition, another airline — Muse — operated a significant amount of interstate service at Love Field under the Wright Amendment. *Analysis of the Impact of Changes to the Wright Amendment,* Interdepartmental Task Force on the Wright Amendment (July 1992), at 9.

Southwest has used the Wright Amendment's authorization for unrestricted short-haul service to greatly expand its interstate service at Love Field consistently with the statutory restrictions.

The Department's Earlier Order Interpreting the Wright Amendment

In 1985 the Department issued an order interpreting the Wright Amendment due to an earlier controversy over Love Field service. Continental then proposed to begin operating flights between Love Field and Houston with large aircraft (not aircraft with a passenger capacity of 56 passengers or less). DFW, Dallas, Fort. Worth, and Southwest opposed Continental's plans, primarily because the Wright Amendment allegedly barred Continental from serving Love Field since it interlined with other airlines elsewhere in its system. Several of these parties asked us to block Continental's proposed service. *See* Order 85-7-65 (July 26, 1985).

This dispute led the Department to issue an order interpreting the statutory restrictions. Order 85-12-81 (December

31, 1985), *aff'd, Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). The Department held that an airline that interlined elsewhere on its system could operate interstate flights from Love Field as long as it did not provide interline or through service from Love Field to points outside the Love Field service area, that any airline could operate Love Field flights under the commuter aircraft exemption as long as it used aircraft with a passenger capacity of 56 passengers or less, and that no airline could advertise the availability of service from Love Field to points beyond the Love Field service area.

Despite the Department's decision, Dallas refused to lease any facilities to Continental for its Houston flights. Continental then filed a state court suit against Dallas, which argued that Continental's proposed service would violate the Bond Ordinance and Continental's use agreement with DFW, which required compliance with the Bond Ordinance. Fort Worth and the DFW Board supported Dallas. The Texas Court of Appeals held that Continental's agreement with DFW allowed it to operate the Love Field-Houston service, since the service would be intrastate and therefore permitted by the agreement. *City of Dallas v. Continental Airlines*, 735 S.W. 2d 496 (Tex. Ct. App. 1987). The court agreed with the Department's conclusion that Continental's proposed service would be intrastate service. Continental, however, never began operating the Houston-Love Field service.

The Department's Love Field Study

In the early 1990s members of Congress from Kansas and other states outside the Love Field service area sought a repeal or loosening of the Wright Amendment. The Texas Congressional delegation opposed their efforts. As a result of this Congressional debate, the Department prepared a report on the likely effects of changing the restrictions on Love Field service. *Analysis of the Impact of Changes to the Wright Amendment*, Interdepartmental Task Force on the Wright

Amendment (July 1992) (*"Love Field Study"*). The study analyzed the impact of two possible changes: (i) a repeal of the Wright Amendment and (ii) a modification allowing nonstop flights of up to 650 miles and through service to any beyond destination.

The study concluded that expanding Love Field service would greatly benefit the Dallas-Fort Worth metropolitan area, *Love Field Study*, Executive Summary at 1; that allowing additional service at Love Field "will have little if any impact on Dallas-Fort Worth Airport's growth" and that "[t]he overall impact on Dallas-Fort Worth Airport from a diversion of service to Love Field (or any change in the Wright Amendment under the existing scenarios) is negligible . . . ," *id.* at 10, 31; and that "[u]nder all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the area's dominant airport," *Love Field Study*, Executive Summary at 1.

The Department submitted the report to Congress but made no recommendation on whether the Wright Amendment should be repealed or modified. Congress took no action.

Proposals to Use Reconfigured Aircraft.

In 1996 Dalfort Aviation, Legend's parent, developed a plan to use reconfigured large aircraft (B-737's, B-727's, or DC-9's) to operate longhaul service at Love Field under the commuter aircraft exemption. Dalfort planned to remove all but 56 seats from its large aircraft and then operate flights from Love Field to points outside the Love Field service area. Dalfort argued that its proposed operations is would be lawful under the commuter aircraft exemption. Dalfort requested a legal opinion from the Department on whether its proposed operations were permitted by the Wright Amendment.

On September 19, 1996, the Department's General Counsel, Nancy E. McFadden, issued an opinion that held that the commuter aircraft exemption applied only to aircraft of

originally designed to hold no more than 56 seats. Since Dalfort intended to use larger aircraft reconfigured to come within the 56-passenger capacity limit, Dalfort's proposal would be unlawful.[2]

Dalfort sought judicial review of the opinion. *Astraea Aviation, d/b/a Dalfort Aviation v. U.S. Department of Transportation*, 5th Cir. No. 96-60802 (filed November 18, 1996). The Shelby Amendment made the case moot before it was decided. As noted below, the parties' stipulation to dismiss the case stated that Legend could operate longhaul flights permitted by the Shelby Amendment; exhibit 12 to Dallas' comments is a copy of the stipulation.

The Shelby Amendment.

Congress addressed the General Counsel's opinion by enacting the Shelby Amendment, section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L.No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997). The amendment originated in the Senate Appropriations Committee, whose Chairman is Senator Richard Shelby.

As revised by the conference committee, the Shelby Amendment authorized increased Love Field service in two ways. First, it modified the commuter aircraft exemption so that it expressly exempts service operated by any aircraft reconfigured to hold no more than 56 seats, unless the aircraft's gross aircraft weight exceeded 300,000 pounds. Secondly, the amendment added three states — Kansas, Mississippi, and Alabama — to the Love Field service area (the states within which unrestricted service with large aircraft may be operated from Love Field).

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[2] The General Counsel's conclusion was consistent with a May 16, 1994, ruling by Rosalind A. Knapp, the Department's Deputy General Counsel, on a similar proposal made by Centennial Express. Centennial Express planned to use reconfigured large aircraft to operate service between Denver's Centennial Airport and Love Field.

The Shelby Amendment reads as follows:

> (a) IN GENERAL — For purposes of the exception set forth in section 29(a)(2) the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION—The first sentence of section 29(c) of [the Wright Amendment] is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".
>
> (c) SAFETY ASSURANCE - The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

The Shelby Amendment has already resulted in new service at Love Field, for Southwest is offering through service from Love Field to Jackson, Mississippi, and Birmingham, Alabama. The Wright Amendment had prohibited such service. Southwest alleges that these new services have enabled travellers to obtain much lower fares — the lowest unrestricted one-way fares in the Dallas-Jackson and Dallas-Birmingham markets fell from $324 and $480, respectively, to $149 and $189, respectively, when Southwest began through service. Southwest Comments at 16.

In addition, Legend, a start-up airline, and Continental Express have planned to begin new interstate service. Legend

wishes to operate longhaul service from Love Field with large aircraft reconfigured to hold no more than 56 seats. Continental Express planned to operate Love Field-Cleveland flights with regional jets having no more than 56 seats, but the state court has temporarily enjoined that service (as explained below, the Wright Amendment would have allowed Continental Express to operate these Cleveland flights).

Both Continental Express and American have begun operating intrastate flights at Love Field — Continental Express to Houston, a hub for its affiliate, Continental Airlines, and American to Austin. American operates fourteen daily roundtrip flights to Austin. Continental Express Comments at 1; Legend Comments at 46-47. The DFW use agreements and the Bond Ordinance do not prohibit intrastate service at Love Field and thus allow these American and Continental Express flights.

Other Statutes

Other federal statutes applicable to all airports also govern Dallas' operation of Love Field. A key statutory section, 49 U.S.C. 41713(b), preempts state and local government regulation of airline routes, fares, and services. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219 (1995). However, this section contains an exception allowing a local government that owns an airport to exercise its proprietary powers as the airport's owner. 49 U.S.C. 41713(b)(3). Congress enacted this provision as section 4 of the Airline Deregulation Act of 1978, P.L. No. 95-504, 92 Stat. 1705 (1978).

As discussed below, the applicability here of the preemption provision with its exception allowing airport owners to exercise their proprietary powers is a key issue in the Love Field dispute. Fort Worth and the parties agreeing with Fort Worth claim that the restrictions sought by them may be implemented by Dallas in its capacity as Love Field's owner;

Dallas and the parties opposing Fort Worth contend that Dallas may not impose such restrictions.

Dallas has also obligated itself to comply with the grant assurances required when airports accept FAA Airport Improvement Program grant funds, for Dallas has obtained federal grants for Love Field. Dallas Comments at 2, 15. Those assurances, imposed under 49 U.S.C. 47107, require among other things that the airport be available for public use on reasonable terms and conditions and bar the airport from unjustly discriminating against any user. 49 U.S.C. 47107(a)(1).

The Current Litigation

State Court Litigation. The Shelby Amendment is at the core of the current litigation over Love Field service. Before the President signed the appropriations bill containing the Shelby Amendment, Fort Worth filed a state court suit against Dallas, Legend, and others to block additional service at Love Field. *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997). American Airlines and the DFW Board supported Fort Worth's position in this case.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field-Cleveland flights pending the court's final decision. The DFW Board argued that Continental Express' Cleveland flights should be enjoined since Continental Express' parent corporation, Continental, had signed a use agreement that barred it from operating interstate service at Love Field.

On October 15 the state court granted the summary judgment motions filed by Fort Worth, American, and the DFW Board against Dallas, Continental Express, and Legend. The court found that Dallas was obligated by the Bond Ordinance (as amended by the Wright Amendment) to bar airlines from operating services authorized by the Shelby Amendment and

that federal law did not override the cities' agreement restricting Love Field service. *See* Fort Worth Report on Status of "Fort Worth Action." The court did not issue an opinion explaining the basis for this decision.

Continental Express initially appealed the grant of the temporary injunction but withdrew the appeal after the trial court's summary judgment decision. Continental Express and Legend have publicly stated that they will appeal that decision.

Federal Court Litigation. After Fort Worth sued Dallas in state court, Dallas filed a federal court suit against this Department and Fort Worth to obtain a declaratory judgment that Dallas may not bar airlines from operating service authorized by the Shelby Amendment. *City of Dallas, Texas v. Department of Transportation et al.*, N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). To protect plans to begin flights from Love Field to Houston and Cleveland, Continental Airlines and Continental Express filed their own suit, *Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth*, N.D. Tex. No. 398CV1187-R (filed May 19, 1998). The federal court has consolidated these suits. It had set January 1999 as the deadline for filing summary judgment motions but recently vacated that schedule.

The earlier federal court litigation between Southwest, the two cities, and other parties over Southwest's right to use Love Field had resulted in the issuance of an injunction barring efforts to interfere with the court's decision that Southwest was entitled to continue using Love Field. *Southwest Airlines and Texas Aeronautical Comm'n v. Texas International Airlines et al.*, Order Granting Permanent Injunction (February 23, 1982), N.D. Tex. No. CA 3-75-0340-C. On March 27, 1998, Southwest moved to reopen that proceeding to ensure its ability to operate additional service from Love Field. The district court denied Southwest's

request for an order enforcing its rights after Fort Worth represented that it had no intention of interferring with Southwest's operations *See* Southwest Comments at 17-18.

Related Administrative Proceedings

Administrative Complaint. On November 17, Legend filed a complaint with the FAA against Fort Worth, the DFW Board, and American that charges them with violating federal law. Legend asked the FAA to terminate all aviation grants for Fort Worth.

The FAA dismissed the complaint on December 7. The FAA concluded that Legend's request to enforce the grant restrictions applicable to Love Field was misdirected, since Legend filed the complaint against Fort Worth and the DFW Board, not Dallas. In addition, the FAA stated that it would not investigate complaints about a violation of the statutory preemption provision, 49 U.S.C. 41713, unless the complaint alleged conduct that would also be an unreasonable or unjustly discriminatory restriction on aircraft access by an airport operator under its Airport Improvement Program grant assurances.

Legend's Certificate Application. Legend has filed an application for certificate authority under 49 U.S.C. 41102 so that it may begin airline operations. Docket OST-98-3667. Fort Worth is opposing Legend's application in part by arguing that Legend's proposed service—longhaul flights from Love Field operated with reconfigured large aircraft — would violate the Wright Amendment. Fort Worth Answer at 13-17, Docket OST-98-3667. Fort Worth urged the Department to delay ruling on Legend's application until the state court had decided whether Legend's proposed service would be lawful. *Id.* at 21-22. American filed an answer concurring with Fort Worth's position.

The Department has issued a show-cause order tentatively finding that Legend meets the statutory requirements for obtaining certificate authority. Order 98-10-15 (October 16,

1998). The Department stated that it would consider in this proceeding the arguments about Legend's ability to carry out its service proposal, if the Department did not grant Fort Worth's motion to dismiss. *Id.* at 4-5.

Amendment of U.S. Airlines' Certificate Authority. The Department included in every U.S. airline's domestic certificate a condition barring that airline from operating Love Field service, except as permitted by the Wright Amendment. The Department recently amended that condition to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998). As explained there, the certificate amendments were a ministerial action that did not require a decision on other issues, such as those raised in the pending lawsuits. *Id.* at 6.

FAA Enforcement Proceeding. The FAA has begun an enforcement proceeding against an airport that imposed operating restrictions analogous to the ones that Fort Worth wishes to impose on Love Field. The FAA has issued a Director's Determination, a preliminary decision, holding that the Arapahoe County Public Airport Authority, the owner of Centennial Airport, an airport located near Denver, violated its obligations under federal law by denying access to Centennial Express Airlines, a scheduled airline, when the airport allows charter airlines operating similar equipment to use the airport. *Centennial Express Airlines et al., v. Arapahoe County Public Airport Authority,* FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (issued August 21, 1998) ("Centennial Decision") (exhibit 17 in the DFW Board's comments is a copy of this FAA decision). The FAA held, among other things, that the airport's desire to have scheduled airlines use Denver International Airport was not a legitimate reason for blocking Centennial Express from using Centennial Airport. Centennial Decision at 24, 25. After the Director's Determination was issued, an FAA hearing officer held a hearing in the case as provided by 14 C.F.R. Part 16.

THE DEPARTMENT'S INSTITUTION OF THIS PROCEEDING

The dispute over new service at Love Field led to the institution of this proceeding. Several of the parties in the Texas litigation asked the Department to take steps to help resolve the dispute. Fort Worth asked the Department to mediate the dispute. Dallas and Legend urged the Department to intervene in the state court proceeding, although they suggested that the Department should issue a declaratory ruling if it was unwilling to intervene in the state court proceeding. American, on the other hand, asked the Department to let the Texas courts resolve the dispute.

The Department also received letters from Senator Trent Lott, the Majority Leader of the United States Senate, and Congressman Bud Shuster, the Chairman of the Committee on Transportation and Infrastructure of the United States House of Representatives, asking the Department to take action to assert the federal interests involved in the dispute. After the Department began this proceeding, it received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger.

As the agency primarily responsible for the administration of the relevant statutory provisions, the Department decided to issue a ruling on the federal law questions that are the principal issues underlying the litigation. The Department had taken similar action in 1985 to resolve an earlier dispute over the interpretation of the Wright Amendment. *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985). The Department therefore asked the parties for their views on the federal law issues at issue in the dispute. Order 98-8-29 (August 25, 1998). The Department stated that it would rule on the following federal law issues raised by the Love Field dispute; one issue was added by Order 98-9-5 (September 3, 1998):

(1) Whether the statutory preemption provision, 49 U.S.C. 41713(b), prohibits one airport owner by contract with a second airport owner from maintaining a commitment by the latter to limit airport operations at its own airport, and whether such a restriction falls within the proprietary powers exception in 49 U.S.C. 41713(b)(3);

(2) Whether the Wright and Shelby Amendments preempt the City of Dallas' ability to restrict service at Love Field except as consistent with the terms of those amendments;

(3) Whether the Shelby Amendment authorizes carriers using jet aircraft with a passenger capacity of 56 seats or less to engage in longhaul service from Love Field to any city in the United States;

(4) Whether a major carrier may bind itself through its use agreements with the DFW Air-port Board that it will not exercise the authority granted by its certificate to operate flights from Love Field that are consistent with the Wright and Shelby Amendments; and

(5) Whether the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city within the seven-state area as a connecting point and uses aircraft with no more than 56 seats for its flights between Love Field and the connecting point.

The Department stated that it intended to issue a ruling so that the courts could consider its interpretation. Order 98-8-29 at 5.[1]

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[1] We later granted in part the requests by Fort Worth, American, and the DFW Board for more time for filing comments. Order 98-9-5 at 4.

THE PARTIES' COMMENTS

Parties Opposing Expanded Service

In their pleadings Fort Worth, American, and the DFW Board (collectively "the Fort Worth parties") argue that federal law allows Dallas as Love Field's proprietor to restrict service at that airport and that the Wright and Shelby Amendments do not preempt Dallas' ability to limit the scope of Love Field service, since the two amendments were intended only to limit the Department's authority to authorize service, not the cities' authority to restrict service authorized by the two statutes. These parties assert that Dallas is therefore obligated by the Bond Ordinance to bar airlines from operating the services authorized by the Shelby Amendment. Fort Worth and the DFW Board contend that the exception for aircraft with a passenger capacity of 56 passengers or less does not allow the operation of long-haul service with regional jets or reconfigured large aircraft and that the DFW Board may enforce its use agreement to bar an airline from operating interstate service at Love Field.[4] While American believes that the Bond Ordinance is enforceable against Dallas, American contends that a decision by the Department to the contrary would compel the Department to hold that the DFW Board may not block airlines from operating interstate service from Love Field.

Fort Worth, American, and the DFW Board additionally have made various procedural requests, such as their request

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[4] The DFW Board submitted hundreds of pages of the transcript from the state court's proceedings but specifically cited none of the testimony in support of its case. The DFW Board should have cited any specific testimony that it wished the Department to consider. The courts have held in similar cases that a party must identify the material supporting its case when it files lengthy evidentiary pleadings in an administrative proceeding. *Northside Sanitary Landfill, Inc., Thomas*, 849 F.2d 1516, 1519-1520 (D.C. Cir. 1997); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997).

for a dismissal of this proceeding. The Department is addressing these procedural issues in its companion order.

The Love Field Citizens Action Committee asserts that no decision may be issued without the preparation of an environmental impact analysis.

The Allied Pilots Association, which represents American's pilots, contends that we must consider safety issues before allowing more service at Love Field.

Parties Supporting Expanded Service

Dallas, Southwest, Continental Express, and Legend (collectively "the Dallas parties") contend that the Department may and should issue a decision on the federal law issues. These parties assert that Dallas may not bar airlines from operating the Love Field services authorized by the Wright and Shelby Amendments.

Dallas states that it is committed to maintaining DFW as the area's primary airport but that it needs a clear and final decision on its ability, if any, to restrict Love Field service. Dallas agrees with the DFW Board that it may enforce the provision in the DFW use agreements requiring airlines to comply with the Bond Ordinance's restrictions on using other airports in the Dallas-Fort Worth area.

Continental Express argues that it may operate longhaul service with aircraft with a passenger capacity of 56 passengers or less and that the DFW Board may not enforce the use agreements' prohibition against operating interstate service at other area airports.

Southwest takes no position on the scope of the exception for aircraft with a passenger capacity of 56 passengers or less, except that Southwest contends that an airline may not offer through service to points outside the Love Field service area, whether its Love Field flights use aircraft with a passenger capacity of 56 passengers or less. Southwest also thinks that

the DFW Board may enforce an airline's commitment not to use another airport for interstate service.

The Southwest Airlines Pilots Association argues that expanded service at Love Field will create no safety problems.

Legend asks the Department to act quickly, since the ongoing litigation over the Shelby Amendment is injuring Legend's ability to compete with American and other airlines in Dallas-Fort Worth area markets. Legend agrees with Continental Express that the Shelby Amendment authorizes longhaul service with jet aircraft that meet the 56-passenger capacity requirement. Legend takes no position on whether the DFW use agreement is enforceable.

Other Parties

Two airport trade associations, the Airports Council International-North America and the American Association of Airport Executives ("the airport trade associations"), are concerned about preserving the ability of airport proprietors to reasonably allocate services between different airports and ask the Department to follow a case-by-case approach in determining whether such an allocation is lawful. The airport trade associations also contend that airlines may waive rights by contract.

The City and County of San Francisco supports the airport trade associations' position.

The Greater Orlando Aviation Authority asserts that airlines may waive their rights by contract; if the Department disagrees, it should not make that ruling retroactive.

Delta asks that the decision be limited to the specific facts of Love Field and avoid any broader rulings, since the resolution of preemption questions depends greatly on the factual circumstances.

INTRODUCTION TO OUR DECISION

Summary of Decision

As explained in the companion order, the Department has determined, given its responsibility to administer the federal statutes relevant to the Love Field dispute, that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth's request to dismiss this proceeding, as discussed in the companion order ruling on the procedural issues raised in this proceeding.

In the light of the federal preemption of the regulation of airline routes by state and local governments, Dallas' proprietary powers as Love Field's owner do not allow it to impose the type of restrictions on Love Field service sought by Fort Worth, the DFW Board, and American While an airport owner may impose limits on certain types of service operated at an airport, those limits must be reasonable, non-discriminatory, and necessary to carry out a legitimate goal, such as limiting noise or congestion. The Fort Worth parties have not shown that the restrictions they seek would meet this standard.

In addition, the Wright and Shelby Amendments preempt any agreement between the cities restricting service at Love Field. Congress intended to allow airlines to operate the interstate services authorized by those statutes, despite the cities' wish to eliminate interstate service at Love Field. Congress made that decision under its authority to regulate interstate commerce, which authorizes it to regulate airline and airport operations.

Both the Wright and Shelby Amendments allow any airline to operate longhaul service with aircraft meeting the maximum 56-seat capacity standard, whether the airline may be deemed a commuter airline and whether the aircraft is a jet.

The DFW use agreements cannot block an airline from offering interstate service at Love Field. Like Fort Worth and Dallas, DFW has no authority to restrict an airline's use of Love Field. The Department disagrees with the DFW Board's contention that its agreements constitute an enforceable waiver by the airlines of any rights to use Love Field-insofar as the use agreements bar an airline from operating at an airport competing with DFW, the agreements are unenforceable.

Finally, the Department finds that Continental Express may offer through service to points outside the Love Field service area over Houston, if its flights from Love Field to Houston use aircraft with a passenger capacity of 56 passengers or less.

The Department's conclusion that Dallas may not currently restrict service at Love Field to protect DFW from competition is fully consistent with the FAA's findings in its Centennial Decision. The Department has based this decision, however, on the facts of the Love Field dispute, for proprietary rights issues must be resolved case-by-case. The Department disagrees with the state court's decision on these issues, but the lack of any opinion explaining that court's analysis has prevented the Department from taking the court's rationale into account.

Before addressing the federal law issues set forth in the orders instituting this proceeding, the Department will discuss the safety and environmental issues raised by two parties.

SAFETY AND ENVIRONMENTAL ISSUES

The Safety of Dallas-Fort Worth Area Airline Operations

The Allied Pilots Association, the bargaining representative for American's pilots, suggests that we should defer deciding this proceeding until we have analyzed air traffic procedures for the Dallas-Fort Worth area and determined

whether they should be changed. The Allied Pilots Association alleges that additional flights at Love Field will affect the risk analysis previously undertaken by the FAA.

The Southwest Pilots Association, on the other hand, contends that Love Field is one of the nation's safest airports and that allowing additional service at Love Field will not reduce the safety of airline operations in the Dallas-Fort Worth area. They state, "We do not believe any legitimate safety issues exist, however, with respect to current or reasonably foreseeable levels of operations at Love Field or DFW."

The Department's decision interpreting the federal statutes governing Love Field and preemption will not affect safety. The FAA will maintain the safety of aircraft operations in the Dallas-Fort Worth area. As the *Love Field Study* stated, "The FAA will not permit air traffic safety to be compromised under any circumstances. Safety is ensured by FAA procedures and requirements based on air traffic control and system capacity. . . . " *Love Field Study* at 66. *See also Love Field Study*, Executive Summary at 1. Patrick V. Murphy, the Deputy Assistant Secretary for Aviation and International Affairs, similarly testified on October 21, 1997, before the Subcommittee on Transportation of the Senate Appropriations Committee, that increased Love Field service would not threaten safety, for "we concluded that safety would be maintained by FAA imposed air traffic procedures." The safety of airline operations in the Dallas-Fort Worth area is primarily affected by the total number of operations in the area, not by the number of flights using a particular airport.[5]

Moreover, the Shelby Amendment directs the FAA to monitor safety, and the conference committee report on the

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[5] Under the position taken by Fort Worth and its allies, Southwest and other airlines may already add flights at Love Field within the limits set by the Wright Amendment. In fact American has begun operating fourteen daily roundtrip flights between Love Field and Austin.

bill directed the FAA to review and report on air traffic procedures if operations at either DFW or Love Field increase by twenty-five percent or more. H.R. Rep. No. 105-313, 105th Cong., 1st Sess. (1997) at 45. Congress thus decided to authorize additional services at Love Field without first requiring a study of the possible impact on safety.

National Environmental Policy Act Issues

In its comments the Love Field Citizens Action Committee, which represents Love Field area residents dissatisfied with the noise and other environmental problems allegedly created by that airport, asserts that we may not issue a ruling in this proceeding without first preparing an environmental impact statement under the National Environmental Policy Act.

The Department finds that no environmental impact statement is necessary in this proceeding. The Department is interpreting existing statutory requirements. It is not taking discretionary action on its own that would affect the level of operations at Love Field. Congress has enacted legislation specifying what services may and may not be operated at the airport. As a result, there would be no point in preparing an environmental impact statement, as the Department explained when it amended the certificate authority of U.S. airlines to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998) at 6-7. The courts have held that non-discretionary acts are exempt from the requirement to prepare an environmental impact statement, for the primary purpose of a statement is to assist agency decisionmaking. *See, e.g., Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508 (4th Cir. 1992); *Atlanta Coalition on Transportation Crisis v. Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

In addition, the *Love Field Study* contained a detailed analysis of the likely environmental impact of additional

Love Field service. The *Love Field Study* concluded that any environmental effects would be outweighed by the public's ability to obtain more service and lower fares if airlines had a greater ability to serve Love Field. *See* Order 98-10-15 at 5, n. 12.[6]

INTRODUCTION TO THE FEDERAL STATUTORY ISSUES

The Department will now address the five legal issues on which it stated that it would issue an interpretation. As a preliminary matter, however, the Department wishes to emphasize the limited nature of its decision. Insofar as the airport proprietary rights issue is concerned, we are determining whether an airport has the power to restrict airline services in a way which is essentially the same as route regulation when there is no showing that the restrictions are needed to carry out a permissible airport goal.[7] The limited scope of this decision is thus consistent with the

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[6] The Love Field Citizens Action Committee filed a report showing that severe traffic congestion would result if Love Field airline and general aviation operations increase from the current level of 225,000 per year to 400,000 per year. Love Field Citizens Action Committee October 9, 1998 pleading. As Legend points out, the report assumes that, if general aviation operations do not increase, Love Field airline operations will almost triple, which is highly unlikely. Legend Response to Love Field Citizens Action Committee Comments.

[7] The Department is also not considering whether the Love Field restrictions sought by Fort Worth would violate the grant assurances given the FAA by Dallas in order to obtain federal grants for Love Field. The order instituting this proceeding did not ask the parties to address that issue. The prohibition against discrimination would be violated, however, if Southwest were allowed to provide services that other airlines could not. City *of Dallas, Texas v. Southwest Airlines, supra,* 371 F. Supp. At 1028-1030. In addition, the reasoning in the FAA's Centennial Airport decision suggests that restrictions of the type sought by Fort Worth would violate an airport's obligations under its grant assurances, although the FAA stated that it was not deciding the Love Field issues. Centennial Decision at 30, n. 7.

requests by the airport trade associations, San Francisco, and Delta that the Department bear in mind that preemption and proprietary right questions are usually fact-specific and that it should avoid issuing an unnecessarily broad decision that could interfere with the legitimate needs of airports and airport operating practices.

This decision reflects their concerns. The Department recognizes that airport operators have legitimate management needs that are not preempted by federal law. The Department does not intend to undermine their ability to exercise those rights. Here the Department is concerned only with the question of whether Dallas has the authority as Love Field's owner to essentially regulate airline routes. The Department is basing its interpretation of the federal statutes on the specific circumstances of Love Field. While this interpretation of the statutory preemption and proprietary powers provisions in some respects may have wider applicability, the Department is largely following existing law on those issues. Critical to this decision is the lack of any showing that there is a legitimate need (a need recognizable as proper by judicial and administrative interpretations of federal law) for stopping airlines from operating the Love Field services authorized by the Shelby Amendment.

This decision does not undermine the authority of earlier decisions allowing an airport proprietor to impose reasonable and non-discriminatory restrictions on the use of an airport when those restrictions are demonstrably necessary to achieve a rational goal. *See, e.g., Western Air Lines v. Port Authority of New York & New Jersey,* 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd,* 817 F.2d 222 (2d Cir. 1987), *cert, denied,* 485 U.S. 1006. Indeed, in beginning this proceeding the Department stated that it would not consider whether Dallas may take other action to limit the scale of operations at Love Field to alleviate Fort Worth's concerns over the increased scope of service authorized by the Shelby Amendment. Order

98-8-29 at 4-5. The Department has no intention of taking away an airport's ability to reasonably manage its operations. In that regard, the FAA has taken *enforcement action against* the Arapahoe County Public Airport Authority for excluding scheduled carrier operations at Centennial for which no additional airport operating authority is required by the airport. However, the FAA would not compel the airport to apply for an airport operating certificate that would be needed for scheduled service operated with aircraft with more than thirty seats. Centennial Decision at 19.

American argues that a decision allowing more service at Love Field and thereby invalidating the Bond Ordinance's restrictions will frustrate efforts by other cities to create regional airports, efforts which assertedly require restrictions on airline service at existing airports. American Comments at 31; American Reply at 17-19. American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport *Cf. City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

ISSUE ONE: THE SCOPE OF DALLAS' PROPRIETARY RIGHTS

The principal basis of the dispute over expanded Love Field service is Fort Worth's claim that Dallas has obligated itself to restrict service at that airport. Dallas' commitments to Fort Worth allegedly require Dallas to block airlines from

operating the additional services authorized by the Shelby Amendment. Fort Worth bases this claim on the Bond Ordinance, which, as described above, obligated the two cities to transfer all interstate airline service from their local airports to DFW to the extent legally permissible.

American and the DFW Board support Fort Worth's claim that Dallas' commitments to Fort Worth require it to restrict Love Field service. The Dallas parties disagree. They contend that Dallas does not have the authority under federal law to restrict Love Field service as sought by Fort Worth.

As a matter of federal law, Fort Worth may enforce its contract claims against Dallas only if federal law allows Dallas as Love Field's owner to impose the kind of restrictions sought by Fort Worth. The statute defining an airport owner's authority to limit service is 49 U.S.C. 41713(b), which bars state and local governments from regulating airline routes, rates, and services, but allows airport owners to exercise their proprietary rights. As explained below, an airport owner's proprietary powers allow it to restrict airline operations only when the restrictions are reasonable, nondiscriminatory, and designed to achieve a legitimate goal. The airport owner, moreover, must show that the restrictions are both necessary and tailored to achieve a legitimate goal.

Dallas' rights as Love Field's proprietor do not allow it to ban airlines from operating the services authorized by the Shelby Amendment. The Department is here considering only one issue, whether Dallas as Love Field's owner may determine which routes may be served from its airport and by which types of equipment. The discussion of this issue begins by explaining the standard for determining whether an airport owner's regulation is within the owner's proprietary powers. The order then analyzes whether the restrictions sought by Fort Worth would be prohibited but for Dallas' proprietary rights and whether the restrictions could be adopted under

Dallas' proprietary powers. No party cited record evidence indicating that the additional Love Field operations authorized by the Shelby Amendment could threaten DFW's viability or displace DFW as the area's dominant airport.

The Statutory Provisions on Preemption and Proprietary Rights

The preemption provision, 49 U.S.C. 41713(b), including the exception for the exercise of the proprietary rights of airport owners, reads as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide transportation under this subpart.
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> . . . .
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> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Congress enacted this provision when it deregulated the domestic airline business in 1978. Congress did so "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines,* 504 U.S. 374, 378 (1992), quoted in *American Airlines v. Wolens,* 513 U.S. 219, 222 (1995). As part of deregulation, Congress eliminated the Board's power to determine which routes could be operated by an airline. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49

U.S.C. 1371(e)(1). Congress had determined that the public would benefit if each airline was able to choose which markets it would serve in response to market demands. Allowing state and local governments to regulate routes would frustrate Congress' policy.

The Scope of the Proprietary Rights of Airport Owners

A restriction imposed by an airport proprietor must be "reasonable, nonarbitrary, and non-discriminatory" and "avoid even the appearance of irrational or arbitrary action." *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998). The Department's own policy statement, originally adopted by the Board, similarly states that an airport owner's conduct is not preempted as an exercise of its proprietary powers "when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies [of the aviation provisions of Title 49]." 14 C.F.R. 399.110(f). *See also* Centennial Decision at 28, citing *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977).

The principal example for airport owners' exercise of their proprietary powers is their need to restrict operations in order to limit their liability for noise. *Western Air Lines v. Port Authority, supra*, 658 F. Supp. at 956. However, court decisions have allowed airport owners to restrict service for reasons other than limiting noise, as explained below.[8]

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[8] The courts have long held that a state or local government may not restrict airport operations on noise grounds unless that government is the airport's proprietor. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000. Fort Worth is not Love Field's proprietor. It contends, however, that Dallas obligated itself to restrict service at Love Field in order to carry out the cities' joint goal of establishing DFW as the area's dominant airport and that it has the right to

In the leading case, *Western Air Lines v. Port Authority*, a district court upheld a perimeter rule adopted by the Port Authority of New York and New Jersey for LaGuardia in a decision affirmed by the Second Circuit. The Port Authority adopted the rule to force airlines to use JFK, another Port Authority airport, for all nonstop longhaul flights. The perimeter rule restricted nonstop flights at La Guardia to a maximum distance of 1500 miles (with a grandfather exception for Denver flights).

While the district court held that airport owners could regulate subjects other than noise, such as congestion, 658 F. Supp. at 956-957, the court stated the proprietor's power was limited to "the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest." 658 F. Supp. at 958. The district court concluded that the perimeter rule met this standard because Port Authority studies had demonstrated its need for the rule. La Guardia was operating at or near the limits of its capacity in certain areas, which had already created delays and congestion. The Port Authority believed that allowing longer flights (and thus more leisure traffic) at LaGuardia would increase delays and congestion. The district court thus upheld the rule on the ground that it was reasonably designed to alleviate demonstrated problems at LaGuardia by shifting longhaul traffic to JFK and was therefore a legitimate exercise of the proprietary powers of the operator of a multi-airport system. 658 F. Supp. at 959-960.[9]

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enforce Dallas' obligations. This order assumes that Dallas' agreement with Fort Worth does give the latter the right to enforce Dallas' contract obligations, to the extent they are consistent with federal law.

[9] An earlier district court decision, *Aircraft Owners & Operators Ass'n v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969), is consistent with *Western Air Lines*. That decision upheld peak hour fees imposed by the Port Authority on general aviation to reduce demonstrated congestion problems.

On appeal the Second Circuit essentially adopted the district court's analysis as its own. The Second Circuit stated, " . . . we agree with (the district court's] conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary power of airport operators exempted from preemption [by the statute]." 817 F.2d at 226.[10]

The Fifth Circuit also upheld a perimeter rule adopted by the FAA for Washington National Airport (now Ronald Reagan Washington National Airport). *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Court held that the FAA's rule barring longhaul service at National was a rational means of encouraging airlines to move flights to the then little-used facilities at Dulles International Airport. As the court pointed out, since the perimeter rule had been adopted by the FAA, a federal agency, the decision did not involve an interpretation of the statutory preemption provision. 679 F.2d at 1194. The Court stated, however, that the FAA's position as the airports' proprietor gave it the authority to adopt the perimeter rule. 679 F.2d at 1196.[11] The Fifth Circuit observed, "Already empty for much of the day with a [perimeter] rule, Dulles might, if we invalidate the perimeter, cease to exist." 679 F.2d at 1191. The Court also relied on evidence that National Airport was plagued with

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[10] When Delta, which had acquired Western, asked the Supreme Court for certiorari, the United States filed a brief opposing Delta's petition; exhibit 9 to American's comments is a copy of this brief. The brief stated that an airport's proprietary powers included the power to take reasonable steps to prevent congestion and that, "[i]n a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion." United States Brief at 6.

[11] The FAA's preliminary decision in the Centennial Airport case stated, however, that the Fifth Circuit decision does not provide useful guidance for determining the scope of the proprietary rights of a local or state government acting as an airport owner. Centennial Decision at 30, n. 8.

problems such as "overcrowded parking lots and aircraft aprons, insufficient counterspace, traffic congestion, too little baggage claim area, [and] harsh environmental effects on the airport's neighbors." 670 F.2d at 1193.

On the other hand, in *Pacific Southwest Airlines v. County of Orange*, No. CV 81-3248 (C.D. Calif. Nov. 30, 1981), a district court held in an unpublished decision that the airport proprietor, which operated only one airport, could not impose a perimeter rule. The Fifth Circuit reasoned in *City of Houston* that this result was correct, because federal law did not allow the proprietor of a single airport to impose a perimeter rule. 679 F.2d at 1194.

The Second Circuit recently held that New York City as the proprietor of a Manhattan heliport could impose restrictions on helicopter operations there in order to reduce noise but could not regulate helicopter flight paths. *National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2nd Cir. 1998). The Court, moreover, construed its earlier decisions as allowing an airport proprietor to impose restrictions only in order to address noise and other environmental problems. 137 F.3dat 88.[12]

In sum, the courts have allowed airports to impose restrictions on airline operations but have required such restrictions to be justified by proof that the restrictions were necessary to carry out a legitimate airport goal. No court has held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition or that a proprietor's rights include the right to limit competition between airports operated by different proprietors.

The Board and FAA have similarly interpreted the scope of an airport proprietor's rights. When the Board granted Southwest's application for Love Field-New Orleans authority, the Board summarily rejected the argument by the

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[12] The city had not received federal funds for the heliport and therefore was not subject to grant restrictions.

Dallas/Fort Worth Parties and American that Dallas' proprietary rights allowed it to block Southwest's service. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979). The Board stated that the airport proprietary rights provision was not intended to give airport operators "veto power over Board decisions." At that time the Board intended to address the proprietary rights issue in detail in another Love Field proceeding and so discussed the issues only briefly in the order in the first proceeding. 83 CAB at 651-652. The Board, however, never issued a final decision in the second proceeding due to the Wright Amendment's enactment; this statement in the Southwest case appears to be its only ruling on the extent of Dallas' rights as a proprietor. Nonetheless, the Board's language, while curt, clearly held that Dallas could not use its proprietary powers to bar an airline from operating a route at Love Field.

More recently, the FAA Director's Determination concluded that the Arapahoe County Public Airport Authority had violated the preemption provision, 49 U.S.C. 41713, as well as other federal laws, by refusing to allow Centennial Express to operate scheduled service at Centennial Airport when other carriers were allowed to operate non-scheduled services at that airport with similar equipment. The FAA determined that the airport operator had thereby violated the preemption provision. The FAA reasoned that the airport authority's ban on scheduled service at Centennial Airport was a form of route regulation prohibited by the preemption provision: "[The airport authority's] unilateral ban on scheduled service also represents a regulation of air carrier routes, because the effect of the ban is to prohibit regular operations over any route involving the Centennial Airport." Centennial Decision at 29. As the FAA noted, "[T]his unilateral ban on scheduled service creates an inherent conflict with Federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States." *Ibid.* The ban

on scheduled service at Centennial Airport was not a permissible use of the airport authority's proprietary powers, since the authority had not provided an adequate justification for the ban. Centennial Decision at 30-31.

The FAA declared, moreover, that "[p]otential economic harm to another airport would never justify an access restriction under the grant assurance that requires Centennial Airport to be accessible to all categories of aeronautical users on reasonable terms; except possibly in the limited circumstances of a single operator of a multiple airport system . . . . " Centennial Decision at 25.[13]

Finally, the Department held that the Massachusetts Port Authority violated the statutory preemption provision, among other provisions, by adopting a fee structure at Boston's Logan International Airport that was unreasonable. *Investigation into Massport's Landing Fees*, FAA Docket 13-88-2 (December 22, 1988), Opinion at 11, a decision affirmed by the First Circuit in *New England Legal Foundation v. Massachusetts Port Authority, supra.* The Department noted, among other things, that Massport had designed the fees to impose unjustified additional costs on smaller aircraft to discourage them from using Logan. As such, Massport's imposition of the fees did not constitute a valid exercise of its rights as an airport proprietor, Opinion at 9:

> [To raise fees] during times when there is no shortage of runway capacity penalizes smaller aircraft users when they are not imposing congestion-related costs on other

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[13] The FAA issued its preliminary determination after the Colorado Supreme Court held that the airport's conduct was lawful. *Arapahoe County Public Airport Authority v. Centennial Express Airlines*, 956 P.2d 587 (Colo. 1998). The Colorado court, however, recognized that its reasoning would not authorize Dallas to restrict service at Love Field, for the court pointed out that Centennial Airport, unlike Love Field, was attempting to bar a type of airline operation (scheduled service) that had never existed at that airport. 956 P.2d at 596, n. 12.

users. This action by Massport, which unreasonably regulates and manages the type and frequency of access to the airport by air traffic, exceeds its authority as an airport proprietor and intrudes into areas that have been federally preempted.

The Nature and Purpose of the Restrictions Sought by Fort Worth

The question then is whether the restrictions sought by Fort Worth satisfy the standard for a valid airport restriction on airline services, that is, whether those restrictions would be reasonable, non-discriminatory, and necessary for achieving a legitimate goal.

Fort Worth seeks to prohibit all service with large aircraft between Love Field and points outside the Love Field service area created by the Wright Amendment (that is, Texas and the four states bordering on Texas). Those restrictions are equivalent to route regulation. In the initial Southwest litigation, both the district court and the Fifth Circuit observed that Dallas' decision to prohibit Southwest from operating scheduled service at Love Field constituted route regulation. *City of Dallas, supra,* 494 F.2d at 777; 371 F. Supp. at 1024-1025. Section 9.5A of the Bond Ordinance, moreover, gives the DFW Board the power to waive the restriction against using another area airport for interstate service on the basis of an overriding public need for decentralized interstate airline services. In other words, the DFW Board would determine whether public demands justify new airline service at other airports, a determination exactly like the kind of route decisions made by the Board before deregulation, when the Board sometimes specified the airport that must be used for a service.[14] Such action by the DFW

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[14] The Department has recognized that different airports in a metropolitan area can be separate markets, so that service to one airport does not necessarily meet the needs of the market at an alternative airport. The Department therefore granted slot exemptions for low-fare airlines at

Board would be an attempt to undo federal deregulation by imposing its own regulation.

Fort Worth's demands may also frustrate airline plans to develop a specific type of service. For example, as the district court pointed out in the initial Southwest litigation, Dallas' efforts to block Southwest from using Love Field amounted to service regulation, since a short-haul airline like Southwest was necessarily dependent on using a close-in airport to attract passengers. *City of Dallas, supra,* 371 F. Supp. at 1031-1032.

Unless authorized by the proprietary rights exception for airport owners, Fort Worth's demands are plainly inconsistent with the statutory preemption provision. Congress amended our governing statute to end all regulatory authority to determine what domestic routes an airline may fly; the statute provides that our grant of domestic operating authority authorizes an airline to operate anywhere in the nation. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Fort Worth wishes to deny airlines the ability to choose which Dallas-Fort Worth routes they will serve through Love Field, even when the Shelby Amendment would allow service on the routes.

Dallas would clearly violate the preemption provision by imposing the restrictions on Love Field service sought by Fort Worth, unless Dallas' proprietary rights allow it to limit service in that manner.

Chicago's O'Hare International Airport and New York's LaGuardia Airport on the ground that the airport-to-airport routes at issue constituted separate markets justifying slot awards, even though comparable service existed at Chicago's Midway Airport and other New York City airports. *See, e.g.*, Orders 98-4-21 (April 21, 1998) at 13-14 and 98-4-22 (April 21, 1998) at 18-19.

Dallas' Ability as the Airport's Proprietor to Restrict Love Field Service

Applying the principles established by the judicial and agency decisions discussed above, the Department concludes that Dallas' rights as Love Field's owner do not allow it to restrict Love Field service as sought by Fort Worth. As shown, these decisions demonstrate that an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field service meet this standard.

First, Fort Worth is not trying to limit the environmental impact of increased service at Love Field (nor could it, since the airport is not located in Fort Worth). Fort Worth instead seeks to impose limits on Love Field service in order to protect the competitive position of DFW. *See, e.g.,* Fort Worth's Third Amended Petition, *City of Fort Worth, Texas v. City of Dallas, Texas, et al.,* at 16-18; exhibit 16 to American's Comments is a copy of Fort Worth's petition.

Neither the courts, the Board, nor this Department or any element of this Department have stated that a local government may impose restrictions at its own airport or a neighboring airport in order to limit competition for another airport preferred by that government. Such restrictions would be contrary to the very essence of deregulation, which is intended to promote competition. Fort Worth seeks to restrict Love Field service in order to avoid the competition inherent in a deregulated industry.

The closest analogies to the type of restrictions sought by Fort Worth are the National Airport and LaGuardia perimeter rules. When the courts upheld those rules in *Western Air Lines* and *City of Houston,* they did so on the ground that the airport owner had shown that the rules were necessary to

achieve legitimate goals of the owner—the prevention of congestion and delays. The Fifth Circuit additionally relied on evidence showing that the lack of a perimeter rule could force the FAA to close Dulles. Here, in contrast, Fort Worth seeks to restrict service at Love Field only in order to reduce competition for DFW, as shown by Fort Worth's complaint in the state court (the Third Amended Petition cited above) and has neither claimed nor shown that additional Love Field service would make DFW unviable. The goal of reducing competition for one airport cannot justify imposing restrictions on a second airport, when the goal is merely to prevent some service from being diverted to the second airport and to increase revenues at the first airport.

In addition, even if Dallas could restrict Love Field service to protect DFW's revenues, the restrictions sought by Fort Worth would not be a rational means of achieving that goal. Any restrictions imposed by an airport proprietor on airline service must be reasonably necessary to carry out a legitimate goal and be nonarbitrary and nondiscriminatory.

The restrictions sought by Font Worth do not meet that standard. The city seeks, for example, to prohibit all large aircraft service to service to points outside Texas and the four states bordering on Texas (the Love Field service area established by the Wright Amendment)—nonstop flights, one-stop flights, through service, and interline service. Its proposed restrictions would create such anomalous results as allowing unrestricted service with large aircraft to cities such as Albuquerque and New Orleans, while prohibiting nonstop, through, and interline service to cities such as St. Louis and Birmingham. In contrast, the perimeter rules upheld in *Western Air Lines* and *City of Houston* barred only nonstop flights—the rules allowed stopping flights, through service, and interline service. Fort Worth has not justified its proposed restrictions on service to points outside the Love Field service area created by the Wright Amendment. Similarly, Fort

Worth has provided no justification for allowing unrestricted service with aircraft with a passenger capacity of 56 passengers or less while imposing severe restrictions on service operated with larger aircraft. Fort Worth has presented no rational connection between those specific restrictions and Fort Worth's desire to protect DFW, and no showing that the specific restrictions are reasonably necessary to achieve Fort Worth's goals.

While the restrictions sought by Fort Worth are largely the restrictions imposed by the Wright Amendment, that fact cannot validate the cities' adoption of those restrictions.[15] Congress has wide latitude in carrying out its powers to regulate interstate commerce. A state or local government, in contrast, may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary or discriminatory, and are reasonable. *See, e.g., National Helicopter Corp., supra,* 137 F.3d at 89; *British Airways Board v. Port Authority of New York & New Jersey,* 564 F.2d 1002, 1011 (2nd Cir. 1977).

The Fort Worth parties, citing *Western Air Lines* and *City of Houston,* essentially assume that the courts will approve almost any airport perimeter rule, for those parties have made no effort to show that the Bond Ordinance's restrictions are currently needed. That assumption is erroneous. The courts have upheld perimeter rules when the airport owner demonstrated that the rule was needed to alleviate congestion and environmental problems (or, in the case of National, in part to keep the airport owner from having to close its other airport).

Nothing in the plain language of the statute supports Fort Worth's position that Dallas' proprietary rights would allow

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[15] As explained below, the Wright Amendment's commuter aircraft exemption allows longhaul Love Field service with regional jets, notwithstanding Fort Worth's claims to the contrary.

Dallas to block services authorized by the Wright and Shelby Amendments. While the Fort Worth parties attempt to rely on the Wright Amendment's conference committee report, the report does not support their position. The report stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26. Fort Worth and its supporters focus on the report's statement that the statute preserved Dallas' proprietary powers and ignore the statement that Dallas remained subject to the statutory preemption provision. The report clearly states that Dallas must comply with the statutory preemption provision. And, as shown, Dallas' proprietary rights did not allow it to regulate service at Love Field. Fort Worth's position would have permitted Dallas to override the Wright Amendment by declaring that any airport proprietor has the right to ignore a Congressional enactment.

Fort Worth additionally cites a 1980 House committee report that stated that the committee believed that an airport could deny access to an airline (or deny additional facilities to an incumbent airline) when another airport in the metropolitan area was capable of providing adequate facilities for the airlines. Fort Worth Comments at 25, citing H.R. Rep. No. 96-887, 96th Cong., 2d Sess. (1980), part 2 at 15-16. The committee's statement is contrary to judicial and agency decisions on the scope of an airport owner's proprietary rights. The committee, moreover, was stating its view of the existing law, not the purpose of new legislation. As such, its statement is not persuasive authority. *See, e.g., Ohio Public Employees Retirement System v. Betts*. 492 U.S. 158, 167-168 (1989).

The Department's conclusion that Dallas may not regulate Love Field service as demanded by Fort Worth in no way means that airport owners may not use their proprietary

powers for legitimate purposes. However, as to airport restrictions that would otherwise violate the statutory preemption provision, the courts have stated that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." *Western Air Lines v. Port Authority of New York and New Jersey,* 658 F. Supp. 952, 955 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2nd Cir. 1987), quoting *British Airways Board, supra,* 564 F.2d at 1010.

The Fort Worth parties have made no effort to show that barring airlines from operating the services authorized by the Shelby Amendment is now necessary to carry out a permissible goal for an airport proprietor. To the extent that they argue that the restrictions are reasonable, they base their claims on the validity of the cities' original agreement, made thirty years ago. They also construe the Fifth Circuit's decision in *City of Houston* as authorizing Dallas to impose additional restrictions on Love Field service beyond those imposed by federal statute to ensure DFW's role as the area's principal airport, even though the Shelby Amendment has only modestly expanded the types of service already allowed by the Wright Amendment. Neither theory is persuasive, as discussed next.

DFW's Viability

Dallas' proprietary nights arguably would it allow to restrict service if necessary to protect the viability of DFW. However, the Wright and Shelby Amendments currently impose significant restrictions on the airlines' use of Love Field. The Fort Worth parties have cited no evidence showing that the additional Love Field services authorized by the Shelby Amendment would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport.[16] The Dallas parties, on the other hand,

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[16]The Department is addressing the proprietary rights issue in terms of the Love Field dispute, which is how the parties presented their

have presented evidence and reasoning demonstrating that no significant harm to DFW is likely.[17]

First, DFW has been very successful, and its success is a tribute to the cities' willingness to work together to create that airport. The Wright and Shelby Amendments, moreover, continue to impose substantial restrictions on Love Field service. An airline operating large aircraft may not operate nonstop or stopping flights from Love Field to any point outside the eight-state Love Field service area and may not offer through service or interline service from Love Field to any such point. While airlines may provide longhaul service with aircraft with a passenger capacity of 56 passengers or less, using aircraft with a small number of seats for longhaul markets is usually less efficient. Legend. Reply at 15. Indeed, Southwest for a number of years has been the only airline willing to operate service with large aircraft at Love Field subject to the restrictions imposed by the Wright Amendment.

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arguments. American wrongly asserts that the Department framed this issue as an abstract issue without reference to the particular facts of Love Field. American Comments at 3-5, 12. The Department stated that it intended to consider the federal law issues in an effort to help resolve the Love Field dispute. Order 98-8-29 at 4-5. It did not intend to establish a national policy applicable to all airport situations rather than just Love Field. The parties' comments, including American's comments, demonstrate the parties' expectation that the Department would decide whether Dallas' proprietary rights allowed it to restrict Love Field service as demanded by Fort Worth. Their comments present in detail their factual and legal arguments on this issue. See, e.g., American Comments at 12-30. In addition, the airport trade associations and Delta urge the Department to limit its ruling on the first issue to the specific facts of Love Field. ACI/AAAE Comments at 6-7; Delta Reply at 1-2.

[17]Although some parties have suggested that allowing additional Love Field service could undermine the rights of DFW's bondholders, no party has argued that additional Love Field service would actually injure the bondholders' interests. No representative of the bondholders has filed comments in this proceeding.

Secondly, while Southwest has greatly increased the scale of its operations at Love Field since it began operations, that has not kept DFW from growing. DFW's passenger enplanements have risen from 11.3 million in 1979 to 60.5 million in 1997. While DFW had 60.5 million enplaned passengers in 1997, Love Field had only 3.4 million. Continental Express Reply at 2.

In 1997 Southwest operated an average of 270 daily flights at Love Field. The services proposed by Legend, Continental Express, and others will increase that number by ninety flights per day; even so, that level of service will be a small fraction of the 2,800 flights operated each day at DFW. Legend Comments at 47, 63. Even if other airlines add interstate flights, Love Field cannot overtake DFW as the area's primary airport. In addition to the statutory restrictions, Love Field has a relatively small number of available gates. Love Field Study at 51-54.[18]

Moreover, the court decisions on the scope of airport proprietary rights, especially the perimeter rule cases, insist that airports imposing such restrictions must demonstrate a need for the restrictions. The pleadings filed by the Dallas parties pointed out the importance of a showing of need as an essential condition to an affirmance of an airport perimeter rule. See, e.g., Dallas Comments at 23-26; Legend Comments at 89-90. Notwithstanding their arguments, and the courts' express reliance on such a showing, none of the parties

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[18] Other metropolitan areas have multiple airports and still have a dominant airport comparable to DFW, even though service at the secondary airports is not legally restricted. For example, O'Hare is the dominant airport at Chicago, Bush Intercontinental at Houston, Los Angeles International at Los Angeles, and San Francisco International in the San Francisco Bay Area. The secondary airports comparable to Love Field are Midway at Chicago; Hobby at Houston; Hollywood-Burbank, Ontario, and Long Beach in Los Angeles County; and Oakland and San Jose in the Bay Area.

seeking restrictions on Love Field service made any effort to show that current conditions require a prohibition against the operation of the services authorized by the Shelby Amendment.

Equity and Estoppel

Some of the parties opposing additional Love Field service contend that allowing more service at Love Field now would unfairly reverse the cities' expectations that all interstate service would be operated from DFW and injure those parties who allegedly relied on the support of the Civil Aeronautics Board and other federal agencies for the cities' original plan to replace the local airports with DFW. See, e.g., Fort Worth Comments at 4-7. They allege in particular that the two cities agreed to build DFW and close their local airports to airline service largely as a result of the Board's pressure. The DFW Board sums up its position with the phrase, "a deal is a deal." DFW Comments at 3.[19]

Any agreement between the cities on airport operations was always subject to federal statutory law, as recognized by the Bond Ordinance's terms. The DFW Board's estoppel argument misconstrues the two cities' original agreement to move all interstate service to DFW. The Bond Ordinance only required the two cities to end all interstate service at their local airports to the extent "legally permissible." When the U.S. district court initially held that Southwest was entitled to use Love Field, the court reasoned that the Bond Ordinance by its terms did not prohibit all airline service at Love Field. *City of Dallas, supra*, 371 F. Supp. at 1019, 1035.

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[19] Fort Worth, however, has developed Alliance Airport as a major cargo airport. According to Legend, Fort Worth's development of Alliance is inconsistent with the Bond Ordinance, which requires all interstate scheduled service (both passenger and cargo) to be operated at DFW, to the extent legally permissible. Legend Comments at 42-43.

Even without the "legally permissible" qualification in the Bond Ordinance, the cities knew that the operation of DFW and each city's local airports would be subject to regulation by Congress and executive branch agencies. The cities could reasonably expect that regulatory policies would change over the years as the airline business itself changed.

The cities, after all, adopted the Bond Ordinance thirty years ago. Since then the airline industry has been transformed. Congress deregulated the airline industry and took away the Civil Aeronautics Board's authority to determine which airline should fly which route. Now each airline can determine what routes it wants to fly and what kind of service it should offer. Southwest's success is the prime example of the benefits created by deregulation, for Southwest never would have developed into a major airline under the regulatory scheme in place in the 1960's. Moreover, airline traffic in the Dallas-Fort Worth area has quintupled. Continental Express Reply at 2.

In carrying out its authority to regulate interstate commerce, Congress can and does take into consideration changes in the airline industry. Airline services are uniquely subject to federal control. It is Congress that authorized the deregulation of airlines in the expectation that market forces would then drive airline decisions on what services to provide. Nevertheless, Congress has always had the authority to determine what airline services may on may not be operated at any airport. If Congress determines that the restrictions on Love Field should be liberalized, as it did in 1997, the Department is obligated to comply with that determination. In any event, nothing indicates that the Shelby Amendment could significantly weaken DFW's position as the Dallas-Fort Worth area's principal airport. Thus, the amendment will not frustrate the cities' original goal underlying their creation of DFW as the regional airport. Our interpretation of Congress' action accordingly cannot

undermine the two cities' plan to maintain DFW as the area's principal airport.

Fort Worth's Contract and Takings Claims

Fort Worth makes a related claim, that a decision allowing the services authorized by the Shelby Amendment would assertedly violate its Constitutional rights by taking Fort Worth's property without compensation and by impairing its rights under its agreement with Dallas. Fort Worth Comments at 21-23.

Here the Department is merely interpreting statutes that Congress has already enacted, not creating new obligations and mandates on its own. Thus the question is whether Congress has violated Fort Worth's rights. Any question about Congress' authority to determine the scope of permissible service at Love Field has been dispelled twice by the federal courts. *Cramer v. Skinner, supra; State of Kansas v. United States, supra.* Fort Worth never asserted that the Wright Amendment violated its Constitutional rights, even though that statute authorized much more interstate service than is authorized by the Shelby Amendment. We think that Congress' authorization of additional Love Field service under its power to regulate interstate commerce has not injured Fort Worth's Constitutional rights.

If Fort Worth's Takings Clause argument were read as an argument that Congress' regulation of airport operations has interferred with Fort Worth's ability to gain the maximum advantage from its partial ownership of DFW, the claims would have no merit. Congress frequently imposes regulations on the use of property that may diminish its value. Unless the regulation in question causes a substantial reduction in the value of the property and interferes with the owner's legitimate investment expectations, there is no taking. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Concrete Pipe & Products v.*

Construction Laborers Pension Trust, 508 U.S. 602, 643-646 (1993); *Andrus v. Allard*, 444 U.S. 51 (1979).[20]

Furthermore, Congress may license firms to engage in interstate transportation even if that overrides exclusive rights created by state or local law. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1 (1824). The Constitution also does not protect a firm from new competition later authorized by a state or federal government, unless the first firm had an express guarantee that no new competition would be created. *Charles River Bridge v. Warren River Bridge*, 36 U.S. 420, 551-553 (1837). As a result, even if the Shelby Amendment significantly reduces DFW's future revenues, Congress' enactment of that statute could not violate Fort Worth's Constitutional rights.

In any event, Fort Worth's contention that a statutory interpretation allowing more service at Love Field will violate its contract rights has no merit. First, the Bond Ordinance itself requires the cities to move interstate service to DFW only to the extent doing so is legally permissible. In the first round of the Southwest litigation, the district court, as shown, held that the Bond Ordinance means what it says. *City, of Dallas, supra*, 371 F. Supp. at 1019, 1035. Dallas has stated that it never agreed to violate federal law by signing the Bond Ordinance. Dallas Reply at 10. Secondly, parties may not enforce contracts that are contrary to federal law, and they may not avoid federal requirements by characterizing their conduct as contractual in nature. *See, e.g., City and County of San Francisco v. FAA*, 942 F.2d 1391, 1399 (9th Cir. 1991). And Congress and federal agencies may adopt policies invalidating existing contracts between private parties. *See, e.g., See [sic] Republic Airlines v. United Air Lines*, 796 F.2d 526 (D.C. Cir. 1986).

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[20] As Dallas points out, Dallas owns Love Field, and the federal statutes, insofar as they restrict the use of any property, restrict the use of Love Field. Dallas Reply at 10-11.

Dallas' Status as an Airport Owner

The two court decisions upholding a perimeter rule—*City of Houston* and *Western Air Lines*—did so on the ground that the rule was a reasonable and necessary means for an airport proprietor to allocate airline operations between two or more airports controlled by that proprietor. As discussed, if Dallas were viewed as controlling Love Field and DFW, it could not impose restrictions of the kind sought by Fort Worth without a showing that they are necessary to achieve legitimate airport goals.

While the Fort Worth parties believe that Dallas is the owner of a multi-airport system, given its ownership of Love Field and its majority of ownership of DFW, Dallas contends that it is not. The Department agrees with Dallas—Dallas may not be viewed as the operator of a multi-airport system for purposes of those decisions.

The Department recognizes that Dallas is deemed the owner of seven elevenths of DFW and chooses seven of the eleven members of the DFW Board. See, e.g., American Comments at 13. Nonetheless, Dallas does not control DFW, as demonstrated most obviously by DFW's disagreement here and in the state court proceeding with Dallas' position on the interpretation of federal law. In addition, section 9.5B of the Bond Ordinance states that the DFW Board may only grant an airline a waiver allowing it to use a different airport for interstate service with the approval of eight of the eleven Board members. Fort Worth's representatives thus have a veto over the grant of any such waivers, and Dallas does not have the ability to allocate services between Love Field and DFW.[21]

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[21] While Dallas controls other airports, like Redbird, Dallas' ability to restrict service at Love Field would depend on whether it controls DFW, the airport to be benefited by those restrictions, not on whether it controls another airport unaffected by the restrictions, for purposes of this discussion.

One court held that a city may be deemed the airport's proprietor only when it has kept the power to regulate airport operations. The Court held that a city that has leased the management and operation of its airport to a private firm is no longer the proprietor for purposes of determining whether the city may regulate airport operations to reduce noise. *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983). Similarly, in the Centennial Decision the FAA ruled that an airport owner may not restrict service at one airport as part of an allocation of services between airports unless the owner controls both airports: "The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports *under the sponsor's control* and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity." Centennial Decision at 24 (emphasis added).

ISSUE TWO: PREEMPTION BY THE WRIGHT AND SHELBY AMENDMENTS

In addition to considering whether Dallas may restrict Love Field service under its rights as the airport's proprietor under 49 U.S.C. 41713, the Department stated that it would consider whether Congress' enactment of the Wright and Shelby Amendments by themselves preempted Dallas' ability to restrict services authorized by those statutes. On this issue the Fort Worth parties essentially contend that the Wright and Shelby Amendments govern only the conduct of the federal government (that is, this Department and the Board) and grant no affirmative right to any airline to operate interstate service at Love Field. The Dallas parties, on the other hand, contend that the two statutes override the cities' agreement to limit service and prohibit Dallas from barring service permitted by the Wright and Shelby Amendments.

The Department finds that the Wright and Shelby Amendments preempt the cities' ability to regulate service at Love Field.

Whether a federal statute on rule preempts state and local government regulation depends on the intent of Congress. As the Supreme Court has explained, "Preemption may be express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *FMC Corp. V. Holliday*, 498 U.S. 52, 56-57 (1990) (citations omitted).

The Wright and Shelby Amendments, unlike the Federal Aviation Act provisions now codified in Title 49 of the U.S. Code, contain no express preemption provision (as discussed below, however, the conference committee report on the Wright Amendment mentioned the issue). The lack of such a provision, however, does not end the matter, for statutes without an express preemption provision may still preempt state and local regulation.

Congressional legislation will preempt state regulation if Congress' regulation of the area is so extensive that it has occupied the field or if there is a conflict between the state regulation and the achievement of the Congressional purpose. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). The cities' ability to restrict Love Field service is preempted both because Congress has occupied the field and because allowing the cities to restrict service would frustrate Congress' policies.

The Wright Amendment prescribed in detail the interstate airline services that were and were not permissible at Love Field. The Shelby Amendment modified the zone of permissible interstate service by expanding the boundary of the Love Field service area and clarifying which types of aircraft could be operated under the commuter aircraft

exemption. Having chosen to prescribe what interstate service could be operated at Love Field, Congress surely did not intend that Dallas (which in 1980 opposed all interstate service) or other local bodies could override its decision. Given the detailed regulation of Love Field service set forth in the Wright Amendment, Congress preempted state and local regulation of that area by occupying the field. The same is true for the Shelby Amendment.

An analogous case involved the Supreme Court's decision that the City of Burbank, California, was preempted from regulating noise at Lockheed Air Terminal (now the Hollywood-Burbank Airport). *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). The Court held that the pervasive federal regulation of aircraft noise in particular and flights in general meant that Congress had occupied the field. The Court quoted Justice Jackson's concurring opinion in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944):

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands

Burbank therefore could not impose a curfew on flights at the airport. 411 U.S. at 633-634.

The Court's reliance in the Burbank case on the pervasive federal regulation of aircraft operations supports our decision here that Congress has occupied the field, which similarly involves flight operations at an airport. In contrast to areas historically subject to state regulation, interstate airline operations have always been intensively and virtually exclusively regulated by the federal government.

In addition, any prohibition by Dallas of operations authorized by the Shelby Amendment would frustrate the Congressional purpose of allowing specified types of interstate service at Love Field. When Congress enacted the

Wright Amendment, after all, it knew that Dallas and Fort Worth opposed any interstate service at Love Field. If, as contended by the Fort Worth parties, the Wright Amendment was intended only to limit what the Department and the Board could do and to impose no limit on the cities' ability to carry out the Bond Ordinance, there would have been no point in enacting the statute. Dallas would have used its alleged authority to end all interstate service at Love Field, regardless of what Congress legislated.

The conference committee report makes it clear that Congress intended by enacting the Wright Amendment to affirmatively authorize certain types of interstate service. The report stated that the amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 96-716 at 24. This statement clearly indicates that Congress was imposing a compromise, which was accepted by all of the parties despite their conflicting interests. Congress' purpose of establishing a compromise would have been frustrated if, as Fort Worth and its supporters argue, Dallas was to be allowed to restrict interstate service unilaterally beyond the limits of the Wright Amendment.

The conference committee report further stated that the Board "will act expeditiously" on any application for authority to operate the services authorized by the Wright Amendment. H.R. Rep. No. 96-716 at 25. That statement, too, shows that Congress had affirmatively determined that airlines should be able to operate the interstate services authorized by the statute, notwithstanding the cities' known opposition to any interstate service. The claim that Congress intended to limit only the Board's authority, not the cities' powers, is illogical —that interpretation would allow the

cities to ban the very service that Congress told the Board to authorize.

Thus, even if other airports could use their proprietary powers to restrict service at one airport to protect the competitive position of a second airport, Congress has determined as to Love Field that Dallas' ability to restrict service has been preempted to the extent of the services authorized by the Wright and Shelby Amendments.

The Department recognizes, as the Fort Worth parties point out, that the Wright and Shelby Amendments largely take the form of restrictions on the Department's power (originally the Board's power) to grant certificate authority to airlines to serve Love Field. The Wright Amendment's focus on restricting the powers of the Board (and the Department) makes sense, since Congress had no need to enact provisions blocking the cities from restricting Love Field service. The Board had already held that the cities had no power to veto its grant of authority to an airline to operate a Love Field route. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979). That Board decision caused Congress to enact the legislation limiting the Board's powers to award route authority, but Congress took no action to overturn the Board's decision that Dallas could not veto such awards.

As a result, the Wright Amendment (and necessarily the Shelby Amendment) must be read as a Congressional authorization for the operation of the specified types of interstate service at Love Field. Thus any restrictions imposed by Dallas that would frustrate that policy are necessarily preempted. *Cf. Fidelity Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982); *Jones v. Rath Packing Co., supra*, 430 U.S. at 541-543.[22]

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[22] We recognize that we are implying preemption here, despite the lack of an express preemption provision, while our interpretation below of the commuter aircraft exemption is based entirely on the statutory language

The Department finds unpersuasive the suggestions by Fort Worth and American that the Wright Amendment only ratified an existing agreement by the cities to allow some interstate service and that the restrictions on interstate service at Love Field resulted from Dallas' exercise of its proprietary rights, not from Congress' exercise of its authority to regulate interstate commerce. Fort Worth Comments at 9; American Comments at 37. Airlines have complied with the Wright Amendment's restrictions because Congress imposed them. The cities, moreover, never amended the Bond Ordinance to reflect their alleged agreement with the Wright Amendment's terms. Legend Comments at 42; Dallas Reply at 12. Their failure to formally incorporate the Wright Amendment limits further demonstrates that they viewed the Wright Amendment as a Congressional determination that was binding on all parties, even though the cities' own agreement — the Bond Ordinance — has always barred services authorized by the Wright Amendment (except as qualified by the phrase "legally permissible")[23]

The Fort Worth parties cite the conference committee report on the Wright Amendment in support of their claim that there is no preemption. See, e.g., Fort Worth Comments at 33. That report, as noted above, stated that the statute would not affect the cities' proprietary rights nor their obligation to comply with the preexisting preemption

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and our earlier interpretation of the statute. On most questions of interpretation the courts rely on the statutory language. On preemption questions, in contrast, the courts often imply preemption when there is no express preemption provision. The courts are, of course, reluctant to do so as to areas traditionally regulated by the states. The question here involves the regulation of interstate commerce, where the states have always had a smaller and subordinate role.

[23] Even if the Wright Amendment had codified an agreement by the cities, the parties' rights and obligations would be fixed by the statute, not by the agreement. *Cf. Vollmar v. CSX Transportation, Inc.*, 898 F.2d 413, 417 (6th Cir. 1990).

provision. H.R. Rep. No. 96-716 at 26. But the overall purpose of the statute was, as shown, to allow airlines to operate limited types of service at Love Field, a purpose that would be frustrated if the cities were deemed able to restrict Love Field service. In these circumstances, the report's statement is consistent with the Department's finding that the Wright Amendment was intended to preempt local restrictions on airline service.

Finally, as Dallas points out, the Senate's version of the Shelby Amendment expressly gave Dallas the right to veto service by reconfigured large aircraft; the conference committee removed that provision. Dallas Comments at 31 This suggests that Congress did not want to give Dallas any ability to block the additional service authorized by the amendment and that Congress believed that Dallas could not block the service unless Congress expressly gave it that authority.

ISSUE THREE: LONGHAUL SERVICE UNDER THE COMMUTER AIRCRAFT EXEMPTION

Legend and Continental Express plan to operate longhaul service from Love Field with jet aircraft, Continental Express with regional jets designed to hold no more than 56 passengers and Legend with large aircraft reconfigured to hold no more than 56 passengers. Both airlines thus seek to operate under the Wright Amendment's commuter aircraft exemption (an exemption modified by the Shelby Amendment), which allows service operated with aircraft having a passenger capacity of no more than 56 passengers.

The Department stated that it intended to address the airlines' ability to operate under the Wright and Shelby Amendments since some parties have argued that the statutes do not allow longhaul service to be operated with aircraft with a passenger capacity of 56 passengers or less. Those parties contend that Congress intended to allow only short-haul service at Love Field, even if an airline used aircraft with

a passenger capacity of 56 passengers or less, and that an airline may not operate jet aircraft under the exemption for aircraft with a passenger capacity of 56 passengers or less. Fort Worth Comments at 41-42; DFW Board Comments at 37-38, 41.

After considering the arguments on this issue, the Department concludes that the Wright and Shelby Amendments authorize longhaul service with any aircraft with a capacity of no more than 56 passengers. The literal terms of both amendments and the history and obvious purpose of the Shelby Amendment show that the statutes allow such service.

As explained above, subsection (c) of the Wright Amendment allowed an airline to provide nonstop or through scheduled passenger service with large aircraft from Love Field only to points within Texas and one of the states bordering on Texas. However, subsection (a) of the Love Field amendment exempted "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" from the amendment's restrictions on interstate airline service. Unlike subsection (c), subsection (a) imposes no geographical limit on the services operated with the smaller aircraft. Subsection (a) of the Wright Amendment also contained no equipment type restriction, except for the seating capacity limitation.

The Department's 1985 order interpreting the Wright Amendment included a ruling on which airlines could use the commuter aircraft exemption. The Department ruled then, despite the "commuter airline" phrase in the Wright Amendment, that any airline, not just "commuter" airlines, could offer service under the commuter aircraft exemption with aircraft that satisfied the 56-seat limit. Order 85-12-81 at 13. It stated, "Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we

believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative." Order 85-12-81 at 13 (footnote omitted). The Court of Appeals affirmed this interpretation. *Continental Air Lines v. Department of Transportation*, 843 F.2d at 1454-1455.

The opinions given Centennial Express and Dalfort by, respectively, the Department's Deputy General Counsel suggested that the commuter aircraft exemption allowed operations with any aircraft designed to hold no more than 56 seats. Neither opinion indicated that the exemption allowed flights only with limited types of aircraft, although neither expressly held that regional jets were entitled to operate under the exemption. The opinions additionally suggested that there was no limit on the length of flights operated under the exemption. The Deputy General Counsel's letter to Centennial Express, for example, stated the airline could operate flights to Denver under the commuter aircraft exemption with aircraft meeting the 56-seat standard.

The General Counsel's opinion on Dalfort's proposal led Congress to clarify the law. The Shelby Amendment expressly makes the commuter aircraft exemption available to airlines using large aircraft (except widebody aircraft) reconfigured to have a passenger capacity of 56 passengers or less. Congress, on the other hand, did not overturn the Department's 1985 interpretation that, not-withstanding the "commuter airline" phrase, any airline could use the exemption if it operated aircraft with a passenger capacity of 56 passengers or less.

As modified by the Shelby Amendment, the statute places no geographical limit on the length of service operated under the commuter aircraft exemption and prohibits only the use of aircraft with a gross weight of more than 300,000 pounds. Congress thereby has allowed any airline, including Legend and Continental Express, to operate longhaul service at Love

Field with any aircraft, except widebody aircraft, that have a passenger capacity of 56 passengers or less.[24]

The Fort Worth parties nonetheless contend that only short-haul service may be operated under the exemption and that only commuter airline flights using nonjet aircraft are qualified to operate under the exemption. The Department cannot agree with these contentions.

Congress initially created the commuter aircraft exemption for short-haul service, but the exemption never included a restriction on equipment type and, unlike subsection (c), never limited the length of service operated under the exemption. The Department cannot rewrite the exemption to add restrictions like that when Congress never chose to do so.

When Congress enacted the Wright Amendment, only turboprop aircraft had a passenger capacity of 56 passengers or less. Since they were relatively unattractive for travellers on long distance flights, airlines could market turboprop service only on short-haul routes. *See* 43 Fed. Reg. 39587, 39589-35890 (September 6, 1978). In recent years, aircraft manufacturers have developed regional jets, which typically have no more than 56 seats and offer attractive service on long flights. Even if this technological change has undermined Congress' expectation as to the impact of the Wright Amendment's commuter aircraft exemption, the Department could not rewrite the statute by including

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[24] Rather than base this decision on the stipulation filed by the Government in dismissing Dalfort's petition for review in *Astraea* (exhibit 12 to Dallas' comments is a copy of the stipulation), the Department will show that the language of the Wright and Shelby Amendments and Congress' intent in enacting the Shelby Amendment clearly allow any airline to operate longhaul service with aircraft with a passenger capacity of 56 passengers or less of any equipment type (except widebody aircraft). The stipulation correctly stated that any airline could operate longhaul service under the commuter aircraft exemption as long as it used a type of aircraft allowed by the Shelby Amendment.

equipment type restrictions that Congress never included. That is shown by an analogous case involving a federal banking statute, *Independent Insurance Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). As the Court stated there, "We decline appellants' invitation to recast the statute to fit contemporary circumstances; when time and technology open up a loophole, it is up to Congress to decide whether it should be plugged, and how." 997 F.2d at 961.

The Department also has no basis for reinterpreting the phrase "commuter airline" to make it a limiting condition on the exemption's use. Thirteen years ago we held that any airline could use the exemption with aircraft with a passenger capacity of 56 passengers or less, and the Court affirmed that interpretation. The Shelby Amendment did not amend the statute to overturn that interpretation. Since Congress is presumed to know how a statute has been interpreted by the agency responsible for administering it when Congress amends the statute, Congress' failure to overturn that interpretation constitutes a ratification of the interpretation. *See e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1973); *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1215 (D.C. Cir. 1983). *See also Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 201-202 (1991), emphasizing the importance of following *stare decisis* in statutory interpretation cases.

Even a reinterpretation of the statute limiting the exemption's use to commuter airlines would probably not block regional jet flights at Love Field. As Legend points out, commuter airlines like American Eagle are replacing their turboprop aircraft with regional jets. Legend Reply at 23.

More importantly, even if the Wright Amendment were unclear on these issues, the enactment of the Shelby Amendment shows that Congress no longer intends to limit the commuter aircraft exemption to short-haul service. By expressly allowing any aircraft (except aircraft with a gross aircraft weight of more than 300,000 pounds) to qualify for

the exemption, subject only to the maximum 56-passenger capacity limitation, Congress no longer wishes to limit the exemption to short-haul service. After all, the 300,000 pound limitation covers jet aircraft such as B-727's, B-737's, B-757's, some B-767's, and DC-9's that have operating ranges of at least two thousand miles. Congress surely did not view such aircraft as likely to be used only for short-haul service.

While the Shelby Amendment did not specifically address the use of regional jets, Congress' decision to make flights operated with reconfigured large aircraft eligible for the commuter aircraft exemption, and the lack of any equipment type language in the statute, compel the conclusion that regional jets meeting the 56-passenger capacity standard may also be used under that exemption.

ISSUE FOUR: ENFORCEABILITY OF DFW USE AGREEMENT RESTRICTIONS BARRING LOVE FIELD SERVICE

The DFW Board contends that its use agreements with airlines such as American and Continental bar those airlines from using any other airport in the metropolitan area for interstate service without the DFW Board's approval (an airline that signs a use agreement is called a signatory airline). The DFW Board additionally claims that it is entitled to enforce those agreements, even assuming that the airport may not unilaterally bar airlines from using competing airports, since the airlines waived their rights to use alternative airports. If the DFW Board's position is valid, only airlines that do not serve DFW, such as Southwest and Legend, and non-signatory airlines, airlines that serve DFW without signing a use agreement, would be able to operate interstate service at Love Field.[25]

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[25] While these agreements have been in effect since DFW opened, no one has challenged the clause barring the use of alternative airports for

The parties take somewhat different positions on this issue than they do on whether Dallas may restrict service at Love Field. Fort Worth and Dallas support the DFW Board's position. Southwest briefly states its agreement with the DFW Board's position that airlines may contractually waive their rights to use Love Field. While American reaffirms its belief that the cities and the DFW Board may restrict service at Love Field and that the DFW use agreements are valid, it contends that, if we find that the cities and the DFW Board may not restrict service at Love Field, American has the right to operate interstate service at Love Field, even though American is a signatory airline. Legend takes no position on the issue. Continental Express argues that the use agreement is unenforceable because it violates the preemption provision (whether Continental's use agreement restricts Continental Express is a separate issue that we are not addressing here).

On the ground that Continental's use agreement prohibited that airline and affiliated airlines from operating interstate service at other airports in the metropolitan area, the state court's ruling on the summary judgment motions held that neither Continental nor Continental Express could operate interstate flights at Love Field; this ruling is consistent with the court's temporary injunction barring Continental Express's proposed flights from Love Field to Cleveland.

The Department stated that it would consider whether a DFW use agreement would block an airline from exercising its certificate authority to operate flights from Love Field that are consistent with the Wright and Shelby Amendments. Whether the DFW Board can enforce the use agreements barring signatory airlines from operating interstate service at

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interstate service, since no signatory airline tried to operate such service until this year (assuming that Continental Express is deemed a signatory airline). While Continental had planned to begin Love Field-Houston service in 1985, that service was intrastate service.

other airports depends on two federal law questions: whether the DFW Board may bar an airline from using a competing airport, and, if not, whether an airline may nonetheless waive its right to use other airports. The Department has determined to rule on these issues in the context of the Love Field dispute.

As an initial matter, the Department does not agree with the DFW Board's argument that the validity of the use agreement clause is a state contract law question. DFW Board Comments at 42. The clause's validity is necessarily a federal law question as well, because federal statutes, such as the preemption provision, bar airports from imposing some types of restrictions on airlines using an airport. A use agreement that violates federal law is invalid, assuming that an airline may waive its federal right to serve any airport.

As a matter of contract law, the use agreement by its terms does not prohibit signatory airlines from using other airports in the Dallas-Fort Worth area. The agreement does not expressly prohibit the airline party from operating interstate service at any other airport in the area. The agreement instead requires airlines to comply with the Bond Ordinance. Section 3.2 of the agreement states, "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the Airport, to the extent required by the terms of 1968 Regional Airport Concurrent Bond Ordinance" (DFW Board exhibit 23 is a copy of the relevant part of the use agreement). As discussed above, the Bond Ordinance required airlines to move their services to DFW only to the extent "legally permissible." Since Fort Worth and Dallas do not have the power to prohibit interstate service at Love Field, the cities' Bond Ordinance cannot stop airlines from using Love Field for interstate service.

If the Bond Ordinance or a DFW use agreement does prohibit a signatory airline's use of a competing airport, the prohibition would be invalid. The DFW Board may not

restrict an airline from using a competing airport. The preemption provision, 49 U.S.C. 41713, prohibits state and local governments, including airports operated by state and local governments, from regulating airline rates, routes, and services, except when the state or local government is exercising its legitimate powers as an airport proprietor. As discussed above, Dallas' proprietary powers do not allow it to restrict service at Love Field for DFW's benefit. For the same reasons, the DFW Board may not prohibit or limit an airline's use of a competing airport.[26] Since the cities may not impose regulations prohibiting interstate service at Love Field, the DFW Board may not impose such restrictions by contract. *See, e.g., South-Central Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

The DFW Board, supported by Fort Worth and Dallas, contends nonetheless that the DFW Board may enforce the restriction against the use of a competing airport because the signatory airlines have agreed to the restriction and waived any rights they had to use other airports. We cannot agree with that claim. We think that an airline may not make an enforceable waiver of its rights to serve whichever airport it wishes to serve in the Dallas-Fort Worth area.[27]

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[26] In addition, the use agreement appears to be unlawful because it discriminates against interstate commerce by prohibiting an airline from operating any interstate flights from another area airport while placing no limits on intrastate flights.

[27] The Department is ruling on the waiver issue in the context of the Love Field dispute and with respect to a contract clause that strikes at the heart of airline deregulation by giving the DFW Board the power to determine what routes may be operated by airlines serving the metropolitan area. The Department recognizes, as the airport trade associations point out, that airlines and other airport users often waive various rights and that waivers unlike the waiver at issue here may be necessary for an airport's efficient operation. *Cf.* 61 Fed. Reg. 31994, 31998 (June 21, 1996) (policy statement governing airport rates and charges). The ruling on the use agreement clause at issue here is not

The parties claiming that an airline may waive its right to serve a competing airport have unduly minimized the effect of such a waiver. The DFW Board, after all, essentially seeks to regulate airline service in the area by limiting the markets that airlines may serve. The DFW Board's goal is directly contrary to the policies established by Congress in enacting the Airline Deregulation Act of 1978 Congress did not eliminate the Board's authority to regulate airline routes in order to benefit individual airlines. Congress took that action in order to benefit the public—Congress determined that travellers would obtain the best mix of fares and service if airlines were free to respond to market demands. To give airlines the ability to respond to market forces, Congress ended the Board's authority to determine which airline should serve which route. The DFW Board's use agreement would recreate for that body the ability once held by the Board to limit entry and exit in airline markets. In short, the DFW Board's use agreement would, for airlines in the Dallas-Fort Worth area markets, undo the principal feature of Congress' deregulation of the airline industry. The use agreement's bar against the use of a competing airport thus clearly violates public policy (and, as explained, the statutory preemption provision).

As a result, any airline's waiver of its right to determine which airport to serve would be unenforceable. As the Supreme Court has explained, *Brooklyn Saving Bank v. O'Neil*, 324 U.S. 697, 704-705 (1945) (citations omitted),

> [A] statutory right conferred on a private party, but affecting the public interest, may not be waived on released if such waiver or release contravenes the statutory policy. Where a private right is granted in the public interest to effectuate legislative policy, waiver of

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intended to place in doubt the validity of waivers obtained by airports for legitimate reasons.

> a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

See also Restatement, Second, Contracts, section 178.

Indeed, so strong in analogous areas is the policy of eliminating anticompetitive practices that a party to a contract that violates the antitrust laws may ordinarily sue the other party for treble damages for the injury caused the plaintiff by the unlawful provisions. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Perma Life Mufflers v. International Parts*, 392 U.S. 134 (1968). Under general contract law principles, moreover, a contract that acts as a restraint of trade may not be enforced against a party to the contract. Restatement, Second, Contracts, section 186.[28]

In addition, the Department does not see how the public would benefit from allowing the DFW Board to enforce the use agreement clause. If the DFW Board could restrict the use by signatory airlines of other airports, it would frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of additional competition and additional airline service options. The DFW Board has not shown that the clause is needed to obtain legitimate airport goals. As shown, the DFW Board has no authority to restrict airline service at other airports in order to maximize DFW's revenues.

The DFW Board points out that airlines can gain access to DFW facilities without signing a use agreement and that a number of non-signatory airlines are serving the airport.

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[28] Similarly, when we readopted our rules on computer reservations systems ("CRSs") in 1992, we declined to give large travel agencies a waiver from the rules on travel agency CRS contracts, because the restrictions on contracts were primarily intended to promote competition in the CRS business, not to protect travel agencies. 57 Fed. Reg. 43780, 43828 (September 22, 1992).

However, signatory airlines pay lower fees for the use of DFW facilities. DFW Board Reply at 27. The DFW Board has not shown that the reduced fees charged signatory airlines require an airline commitment to use only DFW for interstate flights. The DFW Board has not shown a justification for the restriction, and airlines may not surrender their right under federal law to use other airports in the metropolitan area.

The parties supporting the enforceability of the DFW use agreements mistakenly rely upon language in *American Airlines v. Wolens*, 513 U.S. 219 (1995), in arguing that the agreements may be enforced by the DFW Board. *Wolens* held that the states were not preempted by 49 U.S.C. 41713(b) from enforcing contract obligations voluntarily accepted by a private party. The Court stated, 513 U.S. at 824:

> We do not read [49 U.S.C. 41713(b)], however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. . . . The [Airline Deregulation Act] . . . was designed to promote 'maximum reliance on competitive market forces.' Market efficiency requires effective means to enforce private agreements. . . . As stated by the United States: 'The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'

These statements cannot support a conclusion that the DFW Board can enforce a contract barring an airline from using a competing airport. First, the DFW Board is not a private party—it is a local government agency that seeks to enforce requirements allegedly created by the [Bond Ordinance. The Bond Ordinance in turn is not a private contract—it is an agreement between two cities, Dallas and Fort Worth. Secondly, the reliance on the statements in *Wolens* is ironic. The Court held that the state courts should

be able to enforce private contracts because doing so was essential to achieve Congress' goal of "maximum reliance on competitive market forces." The parties relying on this language here wish to frustrate competitive market forces by enforcing an agreement which assertedly denies airlines any ability to use an airport competing with DFW, whether or not there is a market for service at that airport.

The quoted statement in *Wolens* in any event is essentially irrelevant. That decision involved a different issue—whether a state court could apply its general contract law principles in enforcing a contract that did not violate federal law or policy. The case did not involve a party's ability to enforce a contract clause that did violate federal law or policy.

ISSUE FIVE: RESTRICTIONS ON THROUGH SERVICE FROM LOVE FIELD

At the request of the DFW Board, the Department agreed to consider an issue generated by Continental Express' flights with aircraft with a passenger capacity of 56 passengers or less between Love Field and Houston, a Continental hub. As noted above, subsection (c) of the Wright Amendment prohibits airlines from offering through service between Love Field and points outside the Love Field service area. After beginning its Love Field-Houston flights, Continental Express has been advertising through service between Love Field and points outside the Love Field service area that are served by Continental from its Houston hub (a copy of such an advertisement is at American Comments at 75).[29]

[29] Without the ability to offer through service, Continental Express and Continental could carry a passenger from Love Field to, for example, Lima, Peru, only by selling the passenger a separate ticket for each leg of the journey (that is, Love Field-Houston and Houston-Lima) and requiring the passenger to pick up any checked luggage in Houston and rechecking it for the Lima flight. In addition, Continental Express and Continental could not volunteer information about the availability of the Love Field-Lima service—the traveller could only obtain information by first asking

The Department therefore stated that it would rule on whether an airline may offer through service from Love Field to points outside the Love Field service area, when the through service would involve the use of a flight with aircraft with a passenger capacity of 56 passengers or less from Love Field to another point in Texas from which the traveller would fly to his or her destination outside the Love Field service area.

The Department begins this analysis with the predicate that an airline may provide through service to points outside the Love Field service area on Love Field flights operated with aircraft with a passenger capacity of 56 passengers or less. As discussed above, the commuter aircraft exemption is created by subsection (a) of the Wright Amendment. That subsection, unlike subsection (c), the subsection governing flights with large aircraft, contains no prohibition against through service. Thus an airline operating under the commuter aircraft exemption may offer through service to points beyond the endpoint of the Love Field flight, since the statute by its terms does not prohibit it from doing so. Congress' decision to expressly prohibit through service in subsection (c) but not subsection (a) means that through service is allowed under the commuter aircraft exemption.[30]

Continental Express' Houston flights, however, present a more difficult issue for which the Wright Amendment provides no clear answer. Subsection (a) of the Wright Amendment is limited to interstate flights. Thus the statute

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the airline whether such service was available. See Order 85-12-81 at 10-11.

[30] Some parties opposing Continental Express' position on this issue claim that it was resolved by our earlier interpretation of the Wright Amendment, which stated that an airline could not offer through service on Love Field flights, Order 85-12-81 at 10-13. That language, however, clearly referred to Love Field flights operated with large aircraft subject to the restrictions of subsection (c).

could be read to say that any intrastate flights, like the Love Field-Houston flights, would be covered by subsection (c) and hence would be subject to the prohibition against through service. In that case, Continental Express' offering of through service to points beyond Houston that are outside the Love Field service area would be unlawful.

Such a reading of the statute would be less reasonable than an interpretation allowing through service on flights within Texas. Congress enacted the Wright Amendment because of the controversy created by the Board's 1979 grant of Southwest's application for authority to operate an interstate route. Southwest was already operating a significant amount of intrastate service from Love Field. Congress intended to resolve the dispute over Love Field service by defining the categories of interstate service that could and could not be operated. Subsections (a) and (b) of the Wright Amendment thus prohibit all interstate service except services operated with commuter aircraft and a limited number of charter flights, which are exempt under subsection (a), and interstate services being operated on November 1, 1979, which are exempt under subsection (b). Subsection (c) creates another exception—the exception for flights operated with large aircraft between Love Field and points in Texas and the states bordering on Texas—but does not prohibit any kind of service. As a result, the only express prohibitions are those in subsections (a) and (b), which are limited to interstate service. The Wright Amendment accordingly does not restrict intrastate flights.

Subsection (c) could be read as assuming that an airline that operated intrastate flights from Love Field could not offer through service to points outside the Love Field service area from the endpoint of the Love Field flight, whether the flight ended at another Texas city or at a city within one of the four states bordering on Texas. In our view, the prohibition against through service in that subparagraph

forms one of the conditions under which Congress was willing to allow some interstate service with large aircraft at Love Field. Congress authorized such interstate service on the condition, among others, that the airline did not offer through service to points beyond the Love Field service area.

There is no reason, moreover, why Congress would have intended to prohibit through service on flights operated with aircraft with a passenger capacity of 56 passengers or less to points within Texas but not on flights operated with such aircraft to points outside Texas. Furthermore, the Shelby Amendment demonstrates that Congress is less interested in limiting Love Field to short-haul service, when the Love Field flight is operated with aircraft with a passenger capacity of 56 passengers or less. As shown above, the Shelby Amendment allows large aircraft to be used under the commuter aircraft exemption, if reconfigured to have a passenger capacity of 56 passengers or less. Congress' willingness to allow large aircraft to operate longhaul service under the commuter aircraft exemption suggests that a reading of the statute allowing through service over a connecting point in Texas would be consistent with Congress' intent.

Although Southwest claims that an interpretation allowing airlines operating Love Field flights with aircraft with a passenger capacity of 56 passengers or less to offer through service will discriminate against it, since it operates only large aircraft, that result stems from Southwest's operational decisions. Southwest has chosen to use only one type of aircraft, which is configured to hold more than 56 seats. Our interpretation will allow Southwest to offer through service from Love Field if it chooses to use smaller aircraft. Thus any discrimination stems from Southwest's own decisions, not from our interpretation of what Congress enacted. Cf. Order 85-12-81 at 10.

ACCORDINGLY:

1. The Department holds that (i) the City of Fort Worth may not enforce any commitment by the City of Dallas under the Bond Ordinance or other agreement to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment;

2. The Department grants the motions by the City Of Fort Worth and Legend Airlines to supplement the record; and

3. The Department grants the motions for leave to file surreplies and other unauthorized documents.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
And International Affairs

(SEAL)

APPENDIX C

UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION OFFICE OF THE SECRETARY WASHINGTON, D.C.

Served: April 14, 1999

Issued by the Department of Transportation
On the 13th day of April, 1999

LOVE FIELD SERVICE INTERPRETATION PROCEEDING

Docket OST-98-4363

ORDER ON RECONSIDERATION

The Department held this proceeding to state its interpretation of several federal statutes as they apply to an on-going dispute over additional airline service at Dallas' Love Field. The Department issued final orders interpreting those statutes, Order 98-12-27 (December 22, 1998), and ruling on various procedural issues, Order 98-12-28 (December 22, 1998). On the statutory questions, the Department primarily held that the City of Dallas as Love Field's owner could not bar airlines from operating services authorized by Congress. Our interpretation was consistent with the position taken by Dallas, Southwest Airlines, Continental Express, and Legend Airlines, but contrary to the position taken by the City of Fort Worth, the Dallas-Fort Worth International Airport Board ("the DFW Board"), and American Airlines.

Fort Worth and the DPW Board are seeking reconsideration of several of the findings and conclusions made by our final orders. Dallas, Continental Express, and Legend oppose reconsideration.

After considering the parties' pleadings, we have determined to grant reconsideration and to reaffirm our interpretations and findings. Fort Worth and the DFW Board have failed to show that our conclusions and analysis contain any errors. This order addresses their requests for reconsideration of the statutory interpretations set forth in Order 98-12-27; a companion order addresses their requests for reconsideration of procedural rulings made by Order 98-12-28.

BACKGROUND

The History of Restrictions on Love Field Service

Our earlier order set forth in detail the factual background to the current dispute over additional Love Field service.[1] In brief, for many years Love Field was Dallas' airport during a period when Fort Worth had its own airport. In 1968 the two cities agreed to build a new airport, the Dallas-Fort Worth International Airport ("DFW"), which would be the area's primary airport. As part of that agreement, the cities enacted a bond ordinance ("the Bond Ordinance"), which required each city, to the extent legally permissible, to phase out interstate airline service at its local airport and to shift that service to DFW. Order 98-12-27 at 3-6.

After DFW opened, a controversy over Southwest Airlines' use of Love Field for interstate service caused Congress to enact Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980), commonly called the Wright Amendment. The Wright Amendment (i) allowed airlines to operate scheduled passenger flights from Love Field to points in Texas and the four states bordering on Texas and (ii) prohibited scheduled

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[1] Order 98-12-27 also set forth the text of the Wright Amendment at 3, the Shelby Amendment at 12-13, and the preemption provision, 49 U.S.C. 41713, at 27.

passenger fights, interline service, and through service from Love Field to points outside those five states (we refer to the area within which unrestricted service is permitted as "the Love Field service area"). The Wright Amendment, however, allowed unrestricted passenger operations with aircraft having a passenger capacity of no more than 56 passengers (this provision is "the commuter aircraft exemption"). The Wright Amendment's authorization of certain types of interstate service at Love Field overrode the Bond Ordinance's apparent prohibition against the operation of any interstate service. Order 98-12-27 at 7-10.

In 1997 Congress amended the Wright Amendment to authorize additional interstate service at Love Field. Section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997), commonly called the Shelby Amendment. The Shelby Amendment expanded the Love Field service area by adding Kansas, Mississippi, and Alabama to the five-state area created by the Wright Amendment. The Shelby Amendment also clarified the meaning of the commuter aircraft exemption. Order 98-12-27 at 12-13. That clarification resolved a dispute between Legend's affiliate, Dalfort Corporation, and the Department, which had ruled that the commuter aircraft exemption did not allow longhaul flights operated with large aircraft reconfigured to hold no more than 56 passengers. Order 98-12-27 at 11-12.

Immediately after the Shelby Amendment's enactment, Fort Worth filed a declaratory judgment suit against Dallas in state court. Fort Worth sought a ruling that Dallas could not allow airlines to operate the new services authorized by that statute. *City of Fort Worth, Texas v. City of Dallas. Texas. et al.*, Tarrant County District Ct. No. 48-171109-97. The suit was removed to federal court but later remanded to the state court, where it has remained. Dallas filed its own suit in

federal court against the Department and Fort Worth. Dallas sought a ruling that federal law did not allow it to block services authorized by the Shelby Amendment. *City of Dallas, Texas v. Department of Transportation et al.*, N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). *See* Order 98-12-27 at 14-15. Other parties also joined the federal and state court litigation.

In the state and federal court cases, as in this proceeding, Fort Worth, the DFW Board, and American have contended that the Bond Ordinance required Dallas to bar the operation of the additional services authorized by the Shelby Amendment and that the relevant federal statutes would allow Dallas to impose such restrictions on airline service. Dallas, Southwest, Continental Express, and Legend have argued the contrary.

The state court issued a decision that, in contrast to ours, held that Dallas was entitled under federal law to block airlines from operating the services authorized by the Shelby Amendment and that the commuter aircraft exemption authorized no flights between Love Field and points outside the Love Field service area. *See* DFW Petition, Exhibit A. After we issued our final decisions in this proceeding, Dallas, Continental Express, and Legend asked the state court to dismiss the suit filed by Fort Worth, to modify the judgment, or to hold a new trial. *See* Dallas Opposition at 11.

The federal court has not held any hearing on the issues. Our issuance of the final orders in this proceeding and, as discussed below, the filing of petitions for judicial review of those orders caused the district court to stay all proceedings in the federal case. *Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth*. N.D. Tex. No. 398CV1187-R (Order of January 12, 1999).

Our Institution of This Proceeding

The requests by several parties in the dispute for our assistance and the importance of the federal law questions presented by the dispute caused us to begin this proceeding. Order 98-8-29 (August 25, 1998). We stated that we would issue rulings on five federal law issues: (i) Dallas' ability as Love Field's owner to restrict airlines from operating Love Field services, (ii) the preemptive effect of the Wright and Shelby Amendments on Dallas' ability otherwise to restrict Love Field service, (iii) the interpretation of the commuter aircraft exemption, (iv) the enforceability of the DFW Board's airline use agreement clauses restricting airlines from using other airports in the area, and (v) Continental Express' ability to offer through service over Houston when its Love Field-Houston flights used aircraft having a passenger capacity of no more than 56 passengers. Order 98-8-29 at 4; Order 98-9-5 (September 3, 1998) at 3.

As we pointed out, we held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing *Love Field Amendment Proceeding,* Order 85-12-81 (December 31, 1985). The Court of Appeals upheld that determination. *Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988).

The Department's Final Decision

After considering all of the parties' submissions, we concluded that we had the authority and responsibility to issue rulings on the relevant federal law issues. Order 98-12-27 (December 22, 1997). We found that the restrictions on Love Field service sought by Fort Worth, American, and the DFW Board are contrary to federal law, as explained below. A separate order granted Legend's application for certificate authority, subject to Legend's obtaining the needed authority from the Federal Aviation Administration ("FAA"), Order 98-12-29 (December 22, 1998).

As we noted, our decision was consistent with a preliminary FAA decision in an administrative proceeding against a Colorado airport. The FAA decision stated that the airport could not prohibit scheduled service operated with small aircraft while allowing non-scheduled commercial services with similar aircraft. Order 98-12-27 at 3, 17, 31, citing *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority.* FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (August 21, 1998).[2]

We recognized that our decision was contrary to the state court's conclusions. However, the state court's failure to issue an opinion explaining its conclusions kept us from taking into consideration that court's reasoning. Order 98-12-27 at 22. The Department was never a party to the state court proceeding and so is not bound by the court's conclusions. Order 98-12-28 at 8.

Before addressing the federal statutory questions, we stated that our decision interpreting the federal statutes governing Love Field and preemption would not affect safety: the FAA would maintain the safety of aircraft operations in the Dallas-Fort Worth area and would not permit air traffic safety to be compromised under any circumstances. Order 98-12-27 at 22-23. We additionally concluded that no environmental impact statement was required for the issuance of our decision, since we were only interpreting statutory requirements imposed by Congress. Order 98-12-27 at 23-24.

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[2] An FAA hearing officer issued a decision on December 23, 1998, affirming the Director's Determination's findings and conclusions ("the Hearing Officer decision"). The Associate Administrator for Airports affirmed the Hearing Officer Decision on February 18, 1999 ("the Final FAA Decision"). The airport proprietor has filed a petition for judicial review. *Arapahoe County Public Airport Authority v. FAA et al.*, 10th Cir. No. 99-9508 (filed March 10, 1999).

The principal statutory issue in our proceeding (and the principal issue addressed in the petitions for reconsideration) was whether federal law would allow Dallas to block airlines from operating the Love Field services authorized by the Shelby Amendment. The applicable statutory provision, 49 U.S.C. 41713(b), preempts state and local government regulation of airline routes, prices, and services. This section, however, allows state and local governments to exercise their proprietary powers as airport owners. 49 U.S.C. 41713(b)(3).[3] We held that Dallas' proprietary rights as Love Field's owner would not allow the city to restrict service at that airport as demanded by Fort Worth. Order 98-12-27 at 26-42.

We emphasized the limited nature of our decision on the scope of Dallas' proprietary powers. We were determining only whether an airport had the power to restrict airline services in a way which was essentially the same as route regulation. Order 98-12-27 at 25. A key factor in our decision was the lack of any showing that there is a legitimate need for stopping airlines from operating the Love Field services authorized by the Shelby Amendment. *Id.* at 33-40. We did not hold that Dallas had no authority to limit the level of operations at Love Field. While Dallas may not regulate airline routes, as sought by Fort Worth, it and other airport operators may regulate most aspects of airport operations. Order 98-12-27 at 24-25.

We pointed out that the judicial and agency decisions in proprietary rights cases have allowed an airport proprietor to impose reasonable and non-discriminatory restrictions on the use of an airport when those restrictions are demonstrably

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[3] In this proceeding we did not consider whether the airport grant statute, 49 U.S.C. 47107, also limited Dallas' ability to restrict Love Field services. *See* Order 98-12-27 at 24, n. 7.

necessary to achieve a rational and legitimate goal. *See, e.g., Western Air Lines v. Port Authority of New York & New Jersey,* 658 F. Supp. 952 (S.D.N.Y. 1986), *affd.* 817 F.2d 222 (2d Cir. 1987), *cert. denied.* 485 U.S. 1006; *National Helicopter Corp. v. City of New York,* 137 F.3d 81, 89 (2d Cir. 1998). *See also* 14 C.F.R. 399.110(f). No court has held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition. Two court decisions had upheld airport perimeter rules adopted to allocate services between airports owned by one proprietor, *Western Air Lines* and *City of Houston v. FAA,* 679 F.2d 1184 (5th Cir. 1982). Both decisions did so on the basis of proof that the rules were necessary to alleviate substantial congestion problems at the airport covered by the restrictions and, in one case, necessary for the viability of a second airport. Order 98-12-27 at 28-32, 30, 34, 41.[4]

We then concluded that the restrictions sought by Fort Worth did not meet the standard for a valid airport restriction on airline services. Those restrictions were equivalent to route regulation. Fort Worth wished to deny airlines the ability to choose which Dallas-Fort Worth routes would be served from Love Field. Order 98-12-27 at 34-35.

While restrictions on Love Field service arguably could be within Dallas' proprietary rights if necessary to protect the viability of DFW (if Dallas were the proprietor of both Love Field and DFW), no party had cited evidence showing that the additional services authorized by the Shelby Amendment would threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport. Order 98-12-27 at 37-38.

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[4]*City of Houston,* however, concerned an FAA rule, not a restriction imposed by an airport operated by a state or local government. Order 98-12-27 at 29. As a result, it may not provide useful guidance for determining the limits of the proprietary rights of state and local governments that own airports. *Id.* at 30, n. 11.

On the second federal law question considered by us, whether the Wright and Shelby Amendments preempted Dallas' ability as Love Field's owner to restrict service, we concluded that the two statutes did preempt whatever proprietary rights Dallas might otherwise have. The two statutes affirmatively authorized airlines to operate certain types of service at that airport. Order 98-12-27 at 42-47.

On the third issue, we concluded that the Shelby Amendment authorized any airline to use jet aircraft with a passenger capacity of no more than 56 passengers to operate flights from Love Field to any city in the United States. Neither the Wright Amendment nor the Shelby Amendment placed any limits (other than the passenger capacity limit and a weight limit) on the type of aircraft that could be used under the commuter aircraft exemption. Similarly, neither statute placed any geographical limit on the type of markets that could be served under that exemption, in contrast to the express geographical limits placed on services operated with larger aircraft. Order 98-12-27 at 47-50.

On the fourth issue, we concluded that the DFW Board could not enforce its use agreements with airlines insofar as those agreements purportedly barred airlines from operating interstate flights from any other airport in the Dallas-Fort Worth area without the DFW Board's permission. We reasoned that the use agreements' restrictions on the use of competing airports were equivalent to route regulation by a local government and therefore barred by the statutory preemption provision. Order 98-12-27 at 50-55.

The fifth issue arose because Continental Express was offering through service from Love Field to points outside Texas and the states bordering on Texas on its commuter aircraft flights from Love Field to Houston, the hub of its parent corporation, Continental Airlines. We held that such service was permissible. Order 98-12-27 at 55-58.

Judicial Review Proceeding

Fort Worth, the DFW Board, American, the Love Field Citizens Action Committee, Dallas, and Southwest have filed petitions for review of our decision. *City of Fort Worth, Texas et al. v. Department of Transportation*, 5th Cir. No. 98-60812 (filed December 31,1998).

The filing of the DFW Board and Fort Worth petitions for reconsideration caused the Department to file a motion to dismiss the DFW Board and Fort Worth petitions for judicial review and to defer further proceedings on the other petitions until it issued a decision on reconsideration. The delay in the Fifth Circuit case will be unfortunate, since any continuing uncertainty over the validity of our decision could delay the beginning of additional service at Love Field. That will hurt the public and interfere with Congress' expectation that the Shelby Amendment would lead to new services at Love Field. We nonetheless filed the motion because the courts have held that a party's petition for judicial review must be dismissed if the party seeks reconsideration of the agency order and because briefing and arguing the remaining petitions for judicial review would be inefficient when we could either modify our decision or further explain why it is correct.[5]

THE PARTIES' PLEADINGS ON RECONSIDERATION

The DFW Board and Fort Worth seek reconsideration of our conclusions on four of the issues. They argue that we are bound by the state court's judgment and may not issue an order stating an interpretation of the federal statutes contrary to that court's decision. On that basis they contend that we must reverse our decisions on the first, second, and third

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[5] In *West Penn Power Co. v. U.S. EPA*, 860 F.2d 581, 582 (3d Cir. 1988), the Court dismissed the case after it had been briefed and argued when the Court learned that the petitioner had filed a petition for agency reconsideration.

federal statutory questions. That is the only ground on which they seek reconsideration of our decisions on the second and third questions, that is, our conclusions that the Wright and Shelby Amendments preempt Dallas' ability to restrict Love Field service and that the Wright and Shelby Amendments allow airlines to provide longhaul service from Love Field with jet aircraft that meet the 56-passenger capacity limitation. DFW Petition at 1. We see no need to discuss the second and third issues further in this order. As explained in our companion order, we are not bound by the state court's decision.

Fort Worth and the DFW Board additionally charge that we issued our decision on the scope of Dallas' proprietary rights without giving the parties fair notice of our intent to rely on findings of fact. The parties allegedly had no notice that they should submit factual evidence. DFW Petition at 7-8; Fort Worth 98-12-27 Petition at 2-4. The DFW Board also argues that Dallas' proprietary rights allow it to restrict Love Field service for two reasons: to implement the cities' Bond Ordinance and to protect DFW from the significant loss of revenues and service that would result if airlines operated additional flights at Love Field.

The DFW Board briefly challenges our conclusion that it may not block airlines that signed a DFW use agreement from using another Dallas-Fort Worth area airport for interstate service. DFW Petition at 9-10.

Dallas, Continental Express, and Legend have filed answers opposing reconsideration. Dallas and Continental Express contend that we are not required to give full faith and credit to the state court decision. Dallas additionally argues that we need not and should not resolve the factual issues raised by the DFW Board; we should instead state the standard to be used for determining when an airport proprietor may restrict service at an airport to benefit a

second airport. Continental Express and Legend assert that the DFW Board and Fort Worth had the opportunity to submit factual evidence and chose not to exercise it. Legend filed a second reply where it argues that the reconsideration petitions have raised nothing warranting reconsideration, that the proceeding should be completed promptly, and that American, Fort Worth, and the DFW Board seek only to block additional airline competition.

No other party sought reconsideration or responded to the petitions filed by Fort Worth and the DFW Board.

After considering the pleadings, we find no error in our decision and therefore reaffirm our conclusions in Order 98-12-27.[6]

ISSUE ONE: THE SCOPE OF DALLAS' PROPRIETARY RIGHTS

The Fairness of Our Procedures

We gave the parties ample opportunity to present their factual and legal arguments to us. We allowed the parties to file comments and reply comments, and we extended the filing deadlines. We also accepted numerous pleadings filed after the deadlines. Order 98-12-27 at 59. Our first order stated what the issues would be, and the parties' ability to file reply comments allowed them to respond to the points made by opposing parties. Nonetheless, the DFW Board and Fort Worth now contend that we issued our decision on the proprietary rights issue without giving the parties notice that

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[6] Continental Express suggests that we could not modify our conclusions without the approval of the Fifth Circuit. Continental Express Answer at 1, n. 2. We disagree, in large part because we have asked the Court to defer further proceedings until we rule on the reconsideration petitions filed by Fort Worth and the DFW Board *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 540-542 (1970); *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562, n. 1 (D.C. Cir. 1990).

they should submit evidence in support of their statutory arguments. They allege that the lack of notice kept them from filing evidence showing that the restrictions on Love Field service demanded by them were necessary to carry out legitimate goals and were thus within an airport owner's proprietary rights.

Fort Worth claims that it would submit such evidence if we hold a formal hearing. Fort Worth 98-12-27 Petition at 4.

The DFW Board had submitted hundreds of pages from a transcript of the state court proceeding but never specifically relied on any part of that material in presenting its arguments. As explained in our final order, we had no obligation to consider the material since the DFW Board's pleadings cited none of it. Order 98-12-27 at 19, n. 4. The DFW Board's reconsideration petition asserts that the DFW Board would have cited the relevant portions of that transcript had it known that we would rely on factual findings in our decision. DFW Board Petition at 8.

We think there is no merit to these procedural complaints. We concluded as a matter of statutory interpretation that an airport proprietor may not limit service at one airport in order to protect the revenues of a second airport, except arguably when necessary to protect the second airport's viability when the proprietor owns both airports. At most the procedural complaints by the DFW Board and Fort Worth would put in question our application of that legal standard to the factual circumstances of Love Field, for our conclusion on the statutory interpretation issue is not based on our review of the evidence. Furthermore, neither the DFW Board nor Fort Worth claims that it has evidence indicating that the Love Field services authorized by the Shelby Amendment would threaten DFW's viability. As discussed below, the DFW Board contends only that its evidence shows that restrictions on Love Field service are needed to ensure that DFW will continue to have as many flights as it has today. Whether that

evidence is persuasive or not, it is irrelevant under our legal standard. Fort Worth has not claimed that it has any evidence indicating that the services authorized by the Shelby Amendment would put DFW's viability at risk.

Furthermore, the charges that the DFW Board and Fort Worth allegedly had no notice that we would consider factual evidence have no merit. As we explained in our final decision in response to a similar argument by American, Order 98-12-27 at 37, n. 16, the parties knew that we would be addressing the proprietary rights issue in terms of the Love Field dispute. We had stated that we intended to consider the federal law issues in an effort to help resolve the Love Field dispute. Order 98-8-29 at 4-5. This put parties on notice that the factual circumstances underlying the dispute were relevant.

Dallas, Continental Express, and Legend thus did submit factual evidence supporting their position that there was no legitimate basis on which Dallas could block airlines from operating the additional services authorized by the Shelby Amendment. Order 98-12-27 at 37-38. As we stated, notwithstanding the evidentiary submissions and arguments made by Dallas, Continental Express, and Legend, "none of the parties seeking restrictions on Love Field service made any effort to show that current conditions require a prohibition against the operation of the services authorized by the Shelby Amendment." Id at 38. Those parties filed no such evidence even though other parties had pointed out that courts had affirmed airport perimeter rules only on the basis of factual proof that the rules were necessary. *See, e.g.*, Dallas Comments at 23-26; Legend Comments at 89-90.

Against this background, we find that the complaints by the DFW Board and Fort Worth about the alleged lack of notice have no merit. First, Fort Worth does not even say what evidence it would submit or what facts it would attempt to prove. *See* Fort Worth 98-12-27 Petition at 4. We see no reason why we should give Fort Worth an additional

opportunity to submit evidence when it has completely failed to tell us what it would submit and why we must consider it. It is well-established that a party complaining about allegedly unfair agency procedures must show how it has been prejudiced. See, e.g., *Air Canada v. DOT*, 148 F.3d 1142, 1156-1157 (D.C. Cir. 1998); *Northwest Airlines v. DOT*, 15 F.3d 1112, 1122 (D.C. Cir. 1994). Fort Worth has made no such showing.

Equally unpersuasive is the DFW Board's claim that it failed to cite specific portions of the evidence submitted by it only because it allegedly did not know that we would engage in a factual analysis in deciding the proprietary rights issue. Presumably the DFW Board submitted that material because it thought that the evidence would be relevant to our decision. If the DFW Board believed that we would not be considering any factual issues, as it now claims, it would not likely have incurred the expense of filing the hundreds of pages that it did file. If the DFW Board wanted us to rely on evidence contained in the transcripts, it was obligated to cite the statements. Order 98-12-27 at 19, n. 4. It has not excused its failure to do so. We have nonetheless reviewed the material belatedly cited by the DFW Board, as discussed below, and find that it does not show any error in our earlier findings.

Furthermore, federal law clearly allows an airport proprietor to restrict airline service only if the restrictions are reasonable. The DFW Board itself quotes the court's statement in *British Airways Board v. Port Authority of New York & New Jersey*, 558 F.2d 75 (2d Cir. 1977), that any restrictions must be "reasonable" and "advance the local interest." DFW Petition at 8. *See also Western Air Lines, supra*, 658 F. Supp. at 958; *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2d Cir. 1998); 14 C.F.R. 399.110(f). Showing that a restriction is reasonable necessarily requires demonstrating on factual grounds that it is necessary and appropriate for achieving a legitimate airport

goal. The leading judicial decisions on airport restrictions, *Western Air Lines* and *City of Houston*, upheld the restrictions only because the airport proprietor in each case had submitted factual evidence showing that the restrictions were necessary. *See* Order 98-12-27 at 28-30, 34. Thus past court and agency cases gave Fort Worth and the DFW Board notice that they needed to show that the Love Field restrictions sought by them were actually required. The FAA similarly concluded in the Centennial Airport case that the airport proprietor was obligated to demonstrate that any restrictions on airline service were necessary. FAA Final Decision at 27.

Fort Worth's other complaints about the alleged unfairness of our procedures, Fort Worth 98-12-27 Petition at 2, are equally without merit. Fort Worth baselessly charges that we were not interested in hearing evidence or giving the parties a fair opportunity to present their case. It grounds that charge on, among other things, our original decision to give parties two weeks to file comments. As Fort Worth well knows, we later doubled the comment period by Order 98-9-5. We also accepted all of the parties' supplemental pleadings, including eight filed by Fort Worth. Fort Worth wrongly suggests that our refusal to conduct airspace safety and environmental investigations reflected our decision to decide the issues quickly without adequate information. We instead refused to conduct such investigations because they were not legally required. Order 98-12-27 at 22-24. Fort Worth has not challenged that determination on reconsideration, and Fort Worth itself has never requested such investigations.

Fort Worth wrongly alleges that we did not comply with the Administrative Procedure Act. Fort Worth 98-12-27 Petition at 4. As authorized by the Administrative Procedure Act, we issued a declaratory order. Order 98-12-28 at 6, citing 5 U.S.C. 554(e); *British Caledonian Airways v. CAB*, 584 F.2d 982 (D.C. Cir. 1978). This proceeding is an

adjudicatory proceeding addressing a dispute over airline restrictions at one airport, not a rulemaking. We followed the same approach in 1985, which we issued another declaratory order interpreting the Wright Amendment, *Love Field Amendment Proceeding* Order 85-12-81, an order affirmed by the Court of Appeals. *Continental Air Lines*, 343 F.2d 1444. Fort Worth additionally errs in complaining that we failed to give parties adequate notice of what issues we would address. Fort Worth 98-12-27 Petition at 4. The contrary was the case.

Dallas' Ability as Proprietor to Restrict Service to Implement the 1968 Agreement

Aside from its procedural complaints, the DFW Board challenges on two substantive grounds our decision that Dallas' proprietary rights would not allow Dallas to bar Love Field services authorized by the Shelby Amendment. The DFW Board claims that Dallas' proprietary rights allow it to restrict Love Field service when doing so is necessary to carry out the cities' original agreement to phase out interstate service at Love Field and Fort Worth's local airports, DFW Petition at 8-9, and, as discussed in the next section, that restrictions on Love Field service are needed to protect DFW's business.

Our final decision explained that the 1968 Bond Ordinance could not justify restrictions on Love Field service today. Among other things, we noted that the Bond Ordinance by its terms did not flatly prohibit all interstate service at Love Field, since it only required the closing out of interstate service at Love Field to the extent legally permissible. Order 98-12-27 at 6, 39. More importantly, any Bond Ordinance prohibition against interstate service at Love Field would be within Dallas' proprietary powers only if necessary to maintain DFW's viability (if Dallas were deemed to own both airports). No one has shown that a prohibition against the services authorized by the Shelby Amendment is needed to

maintain DFW's existence or even its role as the area's principal airport. Order 98-12-27 at 37-38. In addition, as we pointed out, Congress may both transform the economic regulatory structure for the airline industry and define what operations may be permitted at an airport. Congress has done so by deregulating the airline industry insofar as economic regulation is concerned and by enacting the Wright and Shelby Amendments, which authorize certain types of interstate service, notwithstanding the Bond Ordinance's alleged prohibition against such service. Order 98-12-27 at 39-40.

In that regard the DFW Board's reliance on a 1964 Civil Aeronautics Board decision urging the cities to consolidate their airline service at one airport, DFW Petition at 8-9, is particularly unpersuasive. Congress determined in 1978 to phase out the Board's authority to designate which airport may be used by airlines. As a result, the Board's conclusion is entitled to no weight, since it reflects a type of government intervention that Congress later determined interferes with the best possible development of the airline industry.

The Impact of Additional Love Field Service on DFW's Viability

While an airport owner's proprietary rights would not allow it to restrict service at one airport in order to protect a second airport's revenues, Order 9842-27 at 30, 34, a state or local government that owns two or more airports arguably may be able to restrict service at one airport in order to avoid closing a second airport. However, the factual information cited to us showed that allowing airlines to operate the services authorized by the Shelby Amendment would not threaten DFW's viability. Order 98-12-27 at 37-38.

The DFW Board now asks us to reexamine our conclusion on the basis of testimony from the state court hearing transcript. While its reconsideration petition, unlike its earlier

pleadings, cites specific transcript statements to support of its claims, DFW Petition at 10-15, we find that the cited testimony does not justify any modification in our earlier findings.

First, neither the DFW Board nor Fort Worth attempts to show that earlier judicial or agency decisions would allow an airport owner to restrict service at one airport in order to protect a second airport's revenues.

Secondly, the DFW Board's evidence focuses on how DFW would be affected if airlines like Continental Express could use regional jets for longhaul service from Love Field. The DFW Board claims that other airlines would match Continental Express' proposed nonstop Love Field-Cleveland flights by operating longhaul regional jet service to their own hubs. The resulting diversion of traffic and flights from DFW would allegedly weaken DFW and its hub operations.

This claim is based on a misconstruction of the Wright Amendment. The DFW Board assumes that only the enactment of the Shelby Amendment made longhaul regional jet service lawful at Love Field. The contrary is the case - the Wright Amendment imposed no equipment type restrictions or geographical limits on services operated under the commuter aircraft exemption, as we explained in our final decision. Order 98-12-27 at 47-49. Thus the Wright Amendment, not the Shelby Amendment, authorized longhaul regional jet service.

The DFW Board has failed in any event to show that longhaul regional jet service at Love Field would justify restrictions by Dallas on Love Field service. The DFW Board does not claim that regional jet services or the services authorized by the Shelby Amendment will threaten DFW's viability. The DFW Board instead makes more modest claims: "allowing unfettered operations at Love Field under the Shelby Amendment would contribute to the degradation

of DFW's role as the Dallas/Fort Worth area's dominant airport and threaten to fragment the hub operation at DFW," DFW's growth would be "sharply reduced" by new Love Field service, and "the DFW hub would be sharply reduced in size and scope." DFW Petition at 10.

The DFW Board's predictions, even if correct, would not allow Dallas to bar airlines from operating services authorized by the Shelby Amendment. The DFW Board essentially claims that it must be protected from competition at a second airport, whether or not additional services at the second airport would benefit the public. That position is contrary to the public interest and Congress' policy that competitive market forces should determine the routes served by individual airlines.

The DFW Board's fears arise from the likelihood that a significant number of travellers would prefer to use Love Field rather than DFW and that airlines will add Love Field flights to meet that demand. That result would be consistent with Congress' determination that additional Love Field services should be authorized, since they would benefit many travellers. Some travellers have already benefited. Southwest has stated that its introduction of services authorized by the Shelby Amendment — through service from Love Field to Jackson, Mississippi, and Birmingham, Alabama — has caused a sharp decline in the fares in those markets. Order 98-12-27 at 13. We would be very reluctant to allow the proprietor of one airport to prohibit services at another airport that benefit the public.

We find even less persuasive the DFW Board's contention that Love Field service must be restricted to preserve hub operations at DFW. DFW Petition at 13, 14. American uses DFW as its major domestic hub. While hub operations provide significant benefits for many travellers, restricting other services in order to protect hub services due to their benefits is hardly consistent with Congress' decision that the

market, not government agencies (whether federal, state, or local), should determine the nature and level of airline services offered the public. Neither we nor the DFW Board may properly restrict one kind of service (here, point-to-point service at a local airport) in order to protect a different kind of service.

Moreover, we find implausible the DFW Board's claim that the modest amount of additional service authorized by the Shelby Amendment would significantly damage DFW or American's hub operations. After all, the Wright and Shelby Amendments impose substantial restrictions on longhaul Love Field service. DFW is the nation's second largest airport. Legend Reply at 5. And, as explained in our final order, DFW grew rapidly while Southwest was increasing its operations at Love Field within the limits of the Wright Amendment. DFW's passenger enplanements increased from 11.3 million in 1979 to 60.5 million in 1997. Finally, Love Field has a relatively small number of gates available for new service. Order 98-12-27 at 37-38. The DFW Board's petition addresses none of these facts.

Indeed, the DFW Board cites evidence that unrestricted regional jet service at Love Field could reduce the number of flights at DFW by 109 per day. DFW Petition at 14. But in 1997 the airlines using DFW operated 2,800 flights per day. Order 98-12-27 at 38. Reducing the number of flights per day by less than four percent would not substantially reduce DFW operations.

In addition, as we noted in our final order, other metropolitan areas (Chicago, for example) receive airline service at two or more airports yet still have a dominant airport comparable to DFW. Order 98-12-27 at 38, n. 18. Continental thus operates a hub at Bush Intercontinental Airport at Houston, which has a second airport, Hobby, which is closer than Bush Intercontinental to downtown Houston.

Hobby, unlike Love Field, has no restrictions on airline flights. The DFW Board nonetheless claims that the weakening of American's hub at DFW will cause travellers to shift to Continental's hub at Bush Intercontinental. DFW Petition at 14. Continental's ability to operate a successful hub at Bush Intercontinental despite Hobby demonstrates that allowing additional service at Love Field will not unravel American's hub at DFW.

ISSUE FOUR: ENFORCEABILITY OF DFW USE AGREEMENT RESTRICTIONS BARRING LOVE FIELD SERVICE

The only other issue addressed on the merits by the DFW Board's reconsideration petition is our conclusion that the DFW Board could not enforce its airline use agreements insofar as those agreements arguably bar those airlines from using any other airport in the metropolitan area for interstate service without the DFW Board's approval.

The use agreement's restriction on the use of alternative airports implements the 1968 Bond Ordinance requiring the phase out of interstate flights at airports other than DFW.[7] Our final order explained that the preemption statute, 49 U.S.C. 41713, prohibited the DFW Board, like Dallas, from restricting an airline's use of a competing airport. That statute governs airports operated by state and local governments.

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[7] Although the DFW Board assumed that its use agreements barred signatory airlines from using competing airports in the Dallas-Fort Worth area, we found that those agreements by their terms do not appear to prohibit any airline from conducting interstate operations at other airports in the Dallas-Fort Worth area. The agreements refer to the Bond Ordinance, but that agreement required the phase-out of interstate service at other area airports only to the extent 'legally permissible.' Order 98-12-27 at 52. The DFW Board does not challenge that finding. For purposes of this order, we will nonetheless assume that the DFW Board's reading is correct.

Such airports may not regulate airline operations by ordinance or, as here, by contract. Order 98-12-27 at 52, citing *South-Central Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

The DFW Board briefly asserts that the enforceability of the use-agreement clause does not depend on the validity of the Bond Ordinance, since the clause is a contractual term rather than an incorporation of the cities' agreement. DFW Board Petition at 9-10, citing DFW Board Reply Comments at 21-25. This objection to our decision misses the point. The DFW Board may not enforce the use agreement clause because doing so would constitute the kind of route regulation by a local government proscribed by 49 U.S.C. 41713.

RECONSIDERATION FILINGS

The parties have had ample opportunity to present their factual and legal arguments to us in this proceeding. We have thoroughly considered all of their arguments. Moreover, as noted above, any delay in a final resolution of the federal law issues seems likely to harm the public by creating a risk that airlines will delay or abandon plans to begin operating the services authorized by the Shelby Amendment. We therefore will prohibit the filing of further petitions for reconsideration or other action in this docket until the completion of judicial review.

ACCORDINGLY:

1. The Department of Transportation grants the petitions for reconsideration of Orders 98-12-27 and 98-12-28 filed by Fort Worth and the Dallas-Fort Worth International Airport Board;

2. The Department of Transportation denies the various requests by Fort Worth and the Dallas-Fort Worth International Airport Board that it modify the findings and

conclusions set forth in Order 98-12-27 and reaffirms the findings and conclusions made in that order;

3. We accept the additional reply of Legend Airlines;

4. Except to the extent granted, all other petitions, applications, motions, and other requests are denied; and

5. No further petitions for reconsideration or other pleadings will be accepted in this docket pending judicial review.

By:

A. BRADLEY MIMS

Acting Assistant Secretary for Aviation And International Affairs

(SEAL)

APPENDIX D

INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979

Act of February 15, 1980 (Public Law 96-192, 94 Stat. 35)

An Act to amend the Federal Aviation Act of 1958 in order to promote competition in international air transportation, provide greater opportunities for United States air carriers, establish goals for developing United States international aviation negotiating policy, and for other purposes.

Be it enacted by the Senate *and House of Representatives of the United States of America in Congress assembled. That*
* * *

[Wright Amendment]

Section 29.(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points

outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.

Approved February 15, 1980.

LOVE FIELD ("SHELBY") AMENDMENT

DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES APPROPRIATIONS ACT, Pub. L. 105-66, 111 Stat. 1425, 1447 (Oct. 27, 1997).

Sec. 337 (a) IN GENERAL—For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 [the Love Field Amendment] . . . the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXCEPTION—The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 [the Love Field Amendment] . . . is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".

TEXAS TRANSPORTATION CODE

§ 22.072. JOINT-ACTION AGREEMENT

(a) Two or more public agencies may enter into an agreement with each other for joint action under this chapter. Concurrent action by ordinance, resolution, or otherwise of the governing authorities of the participating public agencies constitutes joint action.

(b) A joint-action agreement must specify:

(1) its duration;

(2) the proportionate interest each public agency has in the property, facilities, and privileges involved;

(3) the proportion each public agency pays of:

(A) the preliminary costs and costs of acquiring, establishing, constructing, improving, and equipping the airport, air navigation facility, or airport hazard area; and

(B) the costs of maintaining, operating, regulating, and protecting the airport, air navigation facility, or airport hazard area; and

(4) any other terms required by this subchapter.

(c) A joint-action agreement may include:

(1) provisions for amending the agreement;

(2) conditions and methods of terminating the agreement;

(3) provisions for disposing of all or any of the property, facilities, and privileges jointly owned before or after all or part of the property, facilities, and privileges cease to be used for the purposes of this chapter or on termination of the agreement;

(4) provisions for distributing the proceeds received on disposal of the property, facilities, and privileges and any funds or other property jointly owned and undisposed of;

(5) provisions for assuming or paying any indebtedness arising from the joint venture that remains unpaid on the disposal of all assets or on termination of the agreement; and

(6) any other necessary or convenient provision.

§ 22.074. JOINT BOARD

(a) Public agencies acting jointly under this subchapter shall create a joint board consisting of members appointed by the governing authority of each participating public agency. The joint agreement shall provide for the number to be appointed and the members' terms and compensation, if any. The joint board shall organize, select officers for terms to be provided by the agreement, and adopt rules for its own procedures.

(b) A joint board may exercise on behalf of its constituent agencies all the powers of each with respect to an airport, air navigation facility, or airport hazard area, subject to the limitations of Sections 22.079-22.082.

(c) A joint board may plan, acquire, establish, construct, improve, equip, maintain, operate, regulate, protect, and police an airport, air navigation facility, or airport hazard area jointly acquired, controlled, and operated. The joint board may also realign, alter, acquire, abandon, or close a portion of a roadway or alleyway without a showing of paramount importance if the portions to be realigned, altered, acquired, or closed are in the geographic boundaries of the airport at the time of or after the realignment, alteration, acquisition, abandonment, or closing. A taking of a right-of-way that occurs in the exercise of this power shall be compensated at fair market value.

(d) If the constituent agencies of a joint board are populous home-rule municipalities, a power described by subsection (c) is exclusively the power of the board regardless of whether all or part of the airport, air navigation facility, or airport hazard area is located in or outside the territory of any of the constituent agencies. Another local government or other political subdivision may not enact or enforce a zoning ordinance, subdivision regulation, construction code, or other ordinance purporting to regulate the use or development of property applicable in the geographic boundaries of the airport as it may be expanded.

APPENDIX E

[CONFORMED COPY]

1968 REGIONAL AIRPORT CONCURRENT BOND ORDINANCE

Authorizing the Issuance of

DALLAS-FORT WORTH REGIONAL AIRPORT
JOINT REVENUE BONDS

Initial Issue—$35,000,000

Adopted by

The City Councils of

The CITY OF DALLAS, TEXAS

and

The CITY OF FORT WORTH, TEXAS

Effective as of November 12, 1968

CITY OF DALLAS ORDINANCE

No. 12352

CITY OF FORT WORTH ORDINANCE

No. 6021

An Ordinance adopted concurrently by the City Councils, respectively, of the Cities of Dallas and Fort Worth, authorizing the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds, Series 1968, in the aggregate principal amount of $35,000,000 for the purpose of defraying in part the cost of constructing, equipping and otherwise improving the jointly owned Dallas-Fort Worth Regional Airport of the Cities; providing for the security and payment of said bonds from the revenues derived from the operation of said Airport and in certain instances from other airport revenues of the Cities; providing that the same shall not be payable from taxation; providing the form, terms and conditions of such bonds and the manner of their execution; providing covenants and commitments regarding the payment of said bonds, the construction of said Regional Airport, and the maintenance and operation thereof when constructed including the pledge to such operation and maintenance purposes of the tax authorized by law; containing covenants against competition; and covenants regarding transfers of airport properties; providing other details concerning such bonds and such Airport, including the reserved power to issue additional joint revenue bonds, and the subordination thereof to the lien and pledge securing other outstanding and future issues of airport revenue bonds of the Cities; providing for the deposit of the proceeds of such bonds into the Construction Fund of the Joint Airport Fund under and subject to the control of the Dallas-Fort Worth Regional Airport Board; authorizing said Board to see to the delivery of said bonds as herein directed and directing that due observance of the covenants herein contained be made by the Board to the extent such covenants are perform-

able by it; providing and describing events of default and the consequences thereof; providing a method of amending this ordinance; ordaining other matters incident and relating to the subject and purpose hereof; and declaring an emergency.

WHEREAS, the Cities of Dallas and Fort Worth have heretofore determined that the present commercial aviation and airport facilities of the Cities, specifically Love Field Airport (hereinafter called and defined as "Love Field") of the City of Dallas and Greater Southwest International Airport (hereinafter called and defined as "GSIA") of the City of Fort Worth, are wholly inadequate to meet the foreseeable commercial aviation needs of the citizens of the Cities and the residents and citizens of the entire North Central Texas Region; and

WHEREAS, the Cities have further found and determined that the most effective, economic and efficient means of providing needed airport facilities is the construction and equipment of a centrally located airport for the Cities and to that end by an agreement entitled and hereinafter defined as the "Contract and Agreement," the Cities continued, expanded and further defined the powers and duties of the Dallas-Fort Worth Regional Airport Board (hereinafter defined as the "Board" or "Regional Airport Board") theretofore created; created the Joint Airport Fund of the Cities; and provided for the construction and operation of an airport to be known as the "Dallas-Fort Worth Regional Airport"; and

WHEREAS, in accordance with the requirements of the Contract and Agreement, the Board has submitted to the City Councils of the Cities a report containing its over-all preliminary plan for the construction of said Regional Airport which plan preliminarily defines and sets forth the estimated, partial cost thereof, together with statements of its projected size, scope and location; and

WHEREAS, the City Councils have each, by duly adopted resolution, approved said plan within the context of the Contract and Agreement, and accordingly the Cities, having been requested so to do by the Board in the manner contemplated by the Contract and Agreement, propose to proceed with the financing of the Regional Airport through the issuance of the joint revenue bonds contemplated by the Contract and Agreement, all in accordance with Article 1269j-5, Article 1269j-5.1, Article 1269j-5.2, Article 46d, and other applicable provisions of Texas Revised Civil Statutes, as amended; and

WHEREAS, the City Councils have each found and determined as to each that the matters to which this Ordinance relates are matters of imperative public need and necessity in the protection of the health, safety and morals of the citizens of each of the Cities and, as such, that this Ordinance is an emergency measure and shall be effective as to each City respectively upon its adoption by its City Council;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS, TEXAS:

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORT WORTH, TEXAS:

ARTICLE I

TITLE, PREAMBLES AND RATIFICATION

SECTION 1.1. *Short Title.* This Ordinance may be cited by the short title "1968 Regional Airport Concurrent Bond Ordinance."

SECTION 1.2. *Adoption of Preambles.* All of the declarations and findings contained in the preambles of the Ordinance are made a part hereof and shall be fully effective as a part of the ordained subject matter of the Ordinance.

SECTION 1.3. *Ratification.* All action heretofore taken (not inconsistent with the provisions hereof) by the Cities, by the Board

* * * *

SECTION 9.5. *Competition, Optimum Airport Development.*

A. It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIC and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport. It is further acknowledged and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certified Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of the public safety; (2) in the interest of prudent and efficient operations at the Regional Airport; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole. However, in order to promote, by voluntary

agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, the Board shall be authorized to establish policies and to make uniformly applicable and non-discriminatory agreements with the air carriers regarding the instances, if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. And in no event, by agreement with air carriers or otherwise, shall limitations or waivers of such covenant allowing a commencement or resumption of Certificated Air Carrier Services at any other airport be adopted if the result thereof would be the reduction in Pledged Revenues below the amount required to satisfy the provisions of Section 9.4 hereof, unless the City (or the Cities in the case of more than one airport) shall also pledge to the payment of all Bonds, by appropriate official action, such part of the revenues from the airport or airports to which such services are to be transferred, resumed or originally commenced, as will justly compensate the Regional Airport (at rates then in effect thereat for similar services), for the loss of such services and the gross Revenues therefrom.

The Board's power under this paragraph shall not include the power to order or direct that specific Aircraft uses be placed at other specific airports unless the owner thereof shall consent to such action or unless such other airport is, or airports are, at the time subject to the control and jurisdiction of the Board.

B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and Facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maxi-

mum extent possible, and neither the Cities nor the Board will undertake with regard to the Regional Airport, Love Field, GSIC, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced or destroyed. It is provided, however, that nothing in this paragraph shall be construed to prohibit the promotion and full development of the operation of reasonable Aircraft uses (other than Certificated Air Carrier Services) at Love Field, Redbird and Meacham Field, or Aircraft operations of any type at GSIA if the same shall ever be made a part of the Regional Airport. Otherwise, Aircraft uses at GSIA shall not be permitted after the Regional Airport becomes operational.

APPENDIX F

Order No. E-18719

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 20th day of August, 1962

In the matter of	)	
DALLAS-FORT WORTH, TEXAS	)	
REGIONAL AIRPORT	)	Docket 13959
INVESTIGATION	)	
	)	

ORDER INSTITUTING INVESTIGATION

The Civil Aeronautics Board has become increasingly concerned in recent months with the use or establishment of separate air carrier airports for service to cities which appear to warrant service through a common airport. The Board believes that in many such instances the use of multiple airports by the scheduled airlines tends to diminish the services to each airport and increase the cost of air transportation. Contrariwise, the concentration of services at one airport will often result in improved air service without serious ground service inconvenience to the users.

Our concern in this regard has already led to the institution of a series of investigations relating to consolidation of air

services for specific areas at a single airport.[1] We have also undertaken in other situations to point to the public interest in concentrating air service for several communities at a single airport.[2] Our stress on the desirability of consolidating air service for closely located communities is a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment without resulting in inconvenience to the users and without adversely affecting the public interest. Consequently, we intend systematically to focus on each situation in which there is a potential public interest in providing service to closely located communities through a single airport.

It is, therefore, understandable why our attention should be drawn to the question of whether scheduled air service to Dallas and Fort Worth should be rendered through a single airport. These communities, which are less than 31 miles apart, have long been concerned with the question of the airport through which they would receive air service. In recent years, the effort on the part of the communities has been to obtain or retain a full pattern of air services to meet their individual needs.[3] In fact, there is currently pending before the Board a

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[1] *New England Regional Airport Investigation*, Docket 13494; *North Central Area Airline Service Airport Investigation*, Docket 13743; *Greensboro-High Point/Winston-Salem Service Through A Single Airport*, Docket 3496; *Service to Ogdensburg, N.Y. Case*, Docket 13335.

[2] *Piedmont Local Service Area Investigation*, Docket 5713, *et al.*, Order E-18123, pp. 12-14; *Pacific Southwest Local Service Case*, Docket 5645, *et al.*; *Southern Transcontinental Service Case*, Docket 7984, *et al.*, Order E-16860 and Order E-17651; *Service to Sheboygan and Manitowoc, Wisconsin Area*, Docket 9767; *Southern Airways "Use It Or Lose It" Investigation and Route Realignment*, Docket 13564.

[3] *Fort Worth Investigation*, Docket 7382.

further proceeding involving questions of adequacy of air service at Forth Worth. These proceedings have been premised on the assumption that these communities should receive air service through separate airports. In this, they were consistent with the policy guidelines which had their grounding in the economics and operations which preceded the advent of the new jet equipment.[4]

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[4]In the memorandum forwarded with its letter relative to Adequacy of Service Problems addressed to all air carriers and many civic bodies under date of May 5,1961, in referring to past adequacy of service cases, the Board made the following statement, *inter alia*:

"An important problem indicated by those cases was the proximity of the complaining cities to a major air transportation center through which the air carriers provided a well-rounded pattern of service. This situation has been compounded during recent years through the development of longer range aircraft and the operational and economic problem of serving two cities as consecutive points when the distance between them is relatively short.

"The conversion by trunkline carriers from a piston-type fleet to a predominantly jet-powered fleet has made more complex the economic problems of air carriers; and for some cities certificated for trunkline service, has created, or may in the future create problems relating to through-plane service and schedule frequency. Many cities do not have airport facilities capable of handling jet operations. In other instances, where cities do have adequate airport facilities, the proximity to other cities with similar facilities may make the provision of a well-rounded pattern of jet service to both points economically unsound. With jet airliners almost doubling the capacity of piston-type aircraft, it is fundamental that in the near term the same frequency of service cannot be operated to every point as has been in the past.

"To enumerate all the problems from both the airline and the city standpoint which have arrived with the conversion to jet equipment would require many pages of detail. These are problems of which we are sure the recipients of this letter are only too well aware. There are, however, several suggestions which are worthy of consideration toward meeting some of these problems. The first of these is the creation of regional airports. In certain situations, in order that all communities within a given area might be assured of adequate jet transportation, it would appear necessary that the communities jointly decide which airport should be used, or in some

We have; however, not as yet focused fairly on the question of whether Dallas and Fort Worth should be served through a single airport. As we have previously noted, we should in due course have undertaken such task as part of our national program. However, we have recently been apprised of the intention of both of these communities to invest substantial funds to meet the anticipated needs of increased air carrier services at airports which are only 12 miles apart. Since our resolution of this matter could have decided effect on the need for enlarged facilities at one or both of the communities, it appeared incumbent upon us to advance the time for a review of this situation.

ACCORDINGLY, IT IS ORDERED:

1. That an investigation, to be known as the *Dallas-Fort Worth Regional Airport Investigation*, Docket 13959, be and it hereby is instituted pursuant to sections 204, 401 and 1002 of the Act, to determine whether the public convenience and necessity require the alteration, amendment or modification of the certificates of all air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be served through a single airport to be designated therein;

2. That a copy of this order shall be served upon the Cities and Chambers of Commerce of Dallas and Fort Worth, Texas, and upon American Airlines, Inc., Braniff Airways, Inc., Central Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., and Trans-Texas Airways,

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instances, at what point a new airport can be constructed to better serve the needs of all."

Inc., who are hereby made parties to this proceeding;

3. That the proceeding ordered herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated;

4. That this order be published in the Federal Register.

By the Civil Aeronautics Board:

MABEL McCART

Acting Secretary

(SEAL)

APPENDIX G

Order No. E-21341

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 30th day of September, 1964

DALLAS-FORT WORTH, REGIONAL AIRPORT INVESTIGATION	)	Docket 13959

ORDER

There has been submitted to the Board for decision in the above-entitled proceeding, the question whether the public convenience and necessity require the alteration, amendment, or modification of the certificates of the air carriers authorized to serve Dallas and Fort Worth, Texas, so as to require that Dallas and Fort Worth be served through a single airport. While we have not yet completed our deliberations in this case, the Board is now of the unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for trans-continental cargo and passenger services.

Before proceeding to the entry of a formal decision in this case, the Board believes that it is in the public interest to afford the interested communities a final opportunity to arrive at a voluntary solution as to the location of the airport to be

designated and the steps that should be taken to achieve this result at a reasonable time in the future. We have faith and confidence that the cities of Dallas and Fort Worth can arrive at a fair and equitable solution of this problem and we therefore have decided to give the communities a period of 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Board. Although we are convinced that the determination of the airport through which the service shall ultimately be provided should be made without delay, we are aware of the practical difficulties involved in the transition to service through a single airport, and contemplate a voluntary arrangement for an orderly transfer that will be finally effected no later than sometime in 1968. Should the parties, contrary to our expectation, be unable to agree to designation of the airport to serve the area, the Board will then proceed promptly to issue a decision.

ACCORDINGLY, IT IS ORDERED: That the City and Chamber of Commerce of Dallas and the City and Chamber of Commerce of Fort Worth be and they hereby are permitted 180 days from the date of this order within which to submit a voluntary agreement as to the airport to be designated as the single airport to serve the two cities, such agreement to include the plans and program for implementing the agreement.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

APPENDIX H

Order No. E-22028

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 13th day of April, 1965

DALLAS-FORT WORTH, REGIONAL AIRPORT INVESTIGATION	)	Docket 13959

ORDER REMANDING PROCEEDING TO THE EXAMINER

This investigation was instituted by the Board to determine whether the public convenience and necessity require the alteration, amendment, or modification of the certificate or certificates of (1) all air carriers, (2) the local service carriers, (3) the trunkline carriers, or (4) any individual air carrier or air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Forth Worth be served through a single airport to be designated in this proceeding.

After due notice a public hearing was held before Examiner Ross I. Newmann, who thereafter issued his Initial Decision. With respect to Love Field, he found that the relatively limited area severely restricts its capacity for future expansion and that a very serious question exists whether it can be expanded to meet the air transportation needs of the Dallas-Fort Worth area beyond the early 1970s. Insofar as

GSIA* is concerned, the Examiner expressed concern over Fort Worth's ability to finance a regional airport and concluded that the record in this case will not support a conclusion that Fort Worth could successfully undertake such a project. Of particular concern to the Examiner was the expenditure of nearly $3.5 million (including $589,250 of Federal funds) for Stage I facilities which would have a maximum use of 5 or 6 years. The Examiner recognized, however, that both cities stand to benefit if a fair and equitable solution to their problems can be worked out and concluded that although the record before him would not support the designation of either Love Field or GSIA, this should not preclude the establishment of a regional airport to serve the north Texas area at some future date if the problems confronting Dallas and Fort Worth can be resolved. As a possible solution, he suggested the creation of an Airport Authority which would assume full responsibility for the planning, development, and operation of all airports in the Dallas-Fort Worth area.

On September 30, 1964, the Board issued an order stating it was unanimously of the opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental passenger and cargo services. The order gave the two cities 180 days to submit such a voluntary agreement.

On March 26, 1965, Dallas filed a motion for an extension of time from March 29 to June 15, 1965, within which to arrive at a voluntary solution of the airport situation in the Dallas-Fort Worth area. In support of its motion, Dallas states that meetings between the top officials of both cities have been held and that great strides have been made towards a mutually acceptable settlement of the dispute; that in the course of these discussions Dallas recognized that any new or

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* Greater Southwest International Airport

substantially improved airport to meet the joint future airline service needs should be located somewhere between Dallas and Fort Worth, and that a joint airport authority would probably provide the best approach for meeting overall financing, construction and operating needs of all airports within the area; that Fort Worth, on its part, was willing to (1) drop its insistence on GSIA as the only possible location for an area airport, (2) agree that Dallas and Fort Worth should have representation on any joint airport authority established proportionate to their respective populations, and (3) explore the possibilities of types of transition from existing airports to a joint new or improved airline airport different from that advocated by it during the Board proceedings.

Dallas believes the major obstacle to complete agreement in principle is the inability of the parties to agree upon a time within which to accomplish a changeover in a major scheduled airline service from Love Field. Dallas' position on this issue is that a 10-year period to prepare for and complete transition of major scheduled airline service from Love Field is necessary in order to permit the parties to provide all the necessary enabling enactments for a fully effective Joint Airport Authority; to enable Dallas to "adjust and adapt its airport in depth" to the proposed changed situation and retire a significant amount of its outstanding indebtedness; and to allow the parties to eliminate costly duplicative financing efforts and to replace them with a carefully studied long-range program.

On April 5, 1965, the Citizens Aviation Association of Dallas filed an answer requesting the Board to deny Dallas' motion. On April 6, 1965, answers were also filed by Bureau Counsel and Fort Worth. The Bureau states that it would not oppose affording the cities an additional period of time within which to come to an agreement on the all-important airport problem if it appears from Fort Worth's answer that such additional time will lead to agreement. The Bureau believes

that voluntary accord is preferable to Board fiat but asserts that if it appears that the prospects of arriving at a satisfactory agreement within the additional time requested are poor or are non-existent, then the Board should take immediate steps to resolve the problem.

Fort Worth agrees that a cooperative solution would be in the public interest but opposes Dallas' motion "because it has come to the reluctant conclusion that there is no prospect for a voluntary agreement under the present method of conducting negotiations between representatives of the two cities." Fort Worth asserts that during the course of the negotiations there was an agreement that the area should be served through a regional airport embracing 5,000 to 10,000 acres located at and adjacent to the present site of GSIA, and that it was agreed in principle that it was desirable that the State legislature should adopt legislation providing for the creation of an Airport Authority with taxing power which would own and operate all airports in the region and would assume all present and prospective indebtedness. Despite these accomplishments, Fort Worth contends there is no reasonable prospect that further negotiations in the present form would produce a final agreement since there are three fundamental issues which the cities have not been able to resolve: the time of transfer[1], the selection of a site location, and the creation of an Airport Authority.

On the basis of the pleadings filed by Dallas and Fort Worth, it is apparent that while the discussions between the two cities have not produced a definitive agreement, many of the obstacles that have heretofore prevented agreement have been minimized or removed. We are firmly of the view that a

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[1] Fort Worth is unalterably opposed to a 10-year transfer period, but proposes a date no earlier than April 1, 1969 and no later than April 1, 1972.

voluntary agreement on the part of both cities is the best solution to their airport problem and we are prepared to assist them in reaching such an agreement. However, if an agreement cannot be reached we will, because of the public interest considerations involved, take appropriate steps to issue a final decision in this proceeding.

Since Fort Worth feels there is no prospect for a voluntary agreement under the present method of conducting the negotiations between representatives of the two cities, we will remand this case to the Examiner who will have full authority to assist the parties in their efforts to reach a definitive agreement, to make any such agreement part of the official record in this proceeding, and to enter an appropriate order terminating the investigation. In the event settlement cannot be effected, the Examiner shall reopen the record to receive (1) evidence showing the areas of agreement and disagreement and (2) further evidence on the question of Fort Worth's ability to finance a regional airport. This will provide the Examiner and the Board with a complete evidentiary record upon which a decision can be based.

In view of the foregoing, we will remand this proceeding for such further evidence and consideration as the issues on remand may warrant.

ACCORDINGLY, IT IS ORDERED: That this proceeding be and it hereby is remanded to the Examiner for the purpose of assisting Dallas and Fort Worth in reaching a definitive agreement with respect to their airport problems, making any such agreement part of the official record in this proceeding, and entering an appropriate order terminating the investigation. In the event an agreement cannot be reached, the Examiner shall reopen the record to receive (1) evidence showing the areas of agreement and disagreement and (2)

further evidence on the question of Fort Worth's ability to finance a regional airport.

By the Civil Aeronautics Board.

HAROLD R. SANDERSON
Secretary

(SEAL)

Nos. 99-1462 and 99-1745

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

In The

Supreme Court of the United States

CITY OF FORT WORTH, TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "proprietary powers and rights" exception to complete federal preemption under the Airline Deregulation Act of 1978 authorizes the City of Dallas, as owner of Love Field, to deny access to Love Field for flights specifically authorized by subsequent federal statutes?

2. Whether litigation in a state court involving some but not all of the parties to a controversy, and some but not all of the issues in dispute, can prevent a federal agency from interpreting a federal statute which it is charged with administering?

PARTIES TO THE PROCEEDING

The following is a list of parties that participated in the proceeding in the United States Court of Appeals for the Fifth Circuit.

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RULE 29.6 STATEMENT

Respondent Southwest Airlines Co. is a corporation whose stock is publicly traded. It has no parent company and no publicly traded company owns 10% or more of its outstanding stock.

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BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondent Southwest Airlines Co. ("Southwest") respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner City of Fort Worth, Texas ("Fort Worth") in Cause No. 99-1462, and in opposition to the Petition for a Writ of Certiorari of American Airlines, Inc. ("American") in the related Cause No. 99-1745. The sole question presented by American in its petition is also one of the three questions in Fort Worth's petition. Southwest will deal in this Brief with both parties' statements of that common issue, as well as one of the additional questions raised by Fort Worth.

STATUTORY PROVISIONS

The relevant statutory provisions appear in the Appendix to this Brief beginning at page 1a. Those provisions are:

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 906-192, 94 Stat. 35, 48 (1980) [the Wright Amendment];

2. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) [the Shelby Amendment];

3. Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 22 Stat. 1705 (1978), codified at 49 U.S.C. § 41713(b); and

4. 28 U.S.C. § 1738.

STATEMENT OF THE CASE

As Southwest has noted in its Response to the Cross-Petition for a writ of certiorari filed by the Dallas-Fort Worth International Airport Board ("DFW Airport Board") in this matter, Cause No. 99-1739, the decisions of the Department of Transportation and the Fifth Circuit now at issue do raise one legitimate question for consideration here – the upsetting by the action below of the carefully crafted scheme of Congress for the distribution of air service in North Texas by the authorization of single-ticketing out of Love Field in Dallas for flights beyond the congressionally prescribed Love Field Service Area. However, one of the very reasons making that question appropriate for resolution here – the significant and explicit involvement of Congress in the management of interstate air traffic out of Love Field – makes this case unsuited for the attention of this Court on the matters presented by the other petitioners.

Specifically, what American calls "the single important issue presented by the decision below"[1] – preemption of local authority by the Airline Deregulation Act of 1978 (the "ADA") – is particularly inappropriate for a general consideration in the context of Dallas and Love Field. For, not only was the matter correctly decided by the Department of Transportation ("DOT") and the Fifth Circuit, it was decided in the context of the most congressionally overseen and directed municipal airport in the country. Some general resolution of the "proprietary powers" issue or some overarching statement of this

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[1] Petition of American Airlines, Inc. for a Writ of Certiorari, Cause No. 99-1745, p. 3 (Am. Pet. 3).

Court on preemption by the ADA, even if the first were thought possible or the second desirable at this time, could not come out of the Dallas situation, given its unique statutory history.

Similarly, the issue which Fort Worth seeks to raise in its Question 3, having to do with preclusion in federal agency proceedings, does not warrant consideration by this Court, both because of the correctness of the decisions below and the particular history of the litigation at issue.[2]

Because the legislative and judicial background against which the DOT and the court of appeals acted is so important for understanding both the correctness of those decisions and their limited impact on other situations, a review of the history of Love Field is appropriate.

I. THE LOVE FIELD LITIGATION

In 1968, after years of sparring over which local airport should be designated to serve the needs of the Dallas-Fort Worth region, the Cities of Dallas and Fort Worth agreed to construct a *new* Dallas-Fort Worth Regional Airport ("DFW") midway between the two cities. For that purpose the cities adopted a Regional Airport Concurrent Bond Ordinance (the "Bond Ordinance"), Section 9.5A of which provided that the Cities:

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[2] Fort Worth's second question for review concerns a matter – the "use agreements" by which certain carriers other than Southwest committed to fly exclusively out of DFW – on which Southwest took no position before the DOT, in the Fifth Circuit or in its Response in Cause No. 99-1739, and on which it takes no position here.

> . . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective *phase-out at Love Field,* Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services,* and to transfer such activity to the Regional Airport effective upon the beginning of operations at the Regional Airport.

City of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015, 1020 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (emphasis added). In 1970, the principal airlines then serving the Dallas-Fort Worth area signed agreements to serve DFW Airport, and in 1974 moved all their flights from Love Field and other local airports to the newly-opened DFW Airport. 371 F. Supp. at 1020-21.

On June 18, 1971, Southwest Airlines began service as an intrastate airline certificated by the Texas Aeronautics Commission, serving routes from Dallas Love Field to Houston and San Antonio, Texas. In October 1971, Southwest advised the DFW Airport Board that it did not intend to serve DFW. Dallas, Fort Worth and the DFW Airport Board subsequently filed a lawsuit in federal court, seeking a declaration of their right under federal and state law to exclude Southwest from Love Field. Southwest counterclaimed, seeking a declaration of its right under federal and state law to remain at Love Field.

In an exhaustive opinion, the district court resoundingly rejected the position of the cities and the DFW Airport Board that they could exclude Southwest from Love Field. Relying on both federal and state law

grounds, the court ruled that Southwest's Love Field service could not be barred by Section 9.5 of the Concurrent Bond Ordinance and that "the exclusion of Southwest Airlines from Love Field would not be legally permissible." 371 F. Supp. at 1035. The Fifth Circuit affirmed this decision on the state law grounds, finding it unnecessary to reach the federal questions; and this Court denied certiorari. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 777 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).[3]

As a consequence of the federal court decisions, Southwest operated out of Love Field, as an intrastate carrier, during most of the 1970's. In 1978, however, Congress passed the Airline Deregulation Act, Pub. Law 95-504 (1978), dramatically liberalizing the route entry and pricing freedom of commercial air carriers. In January 1979, Southwest filed an application with the U.S. Civil Aeronautics Board ("CAB") for authority to fly between Dallas (Love Field) and New Orleans under the Automatic Market Entry ("AME") provisions of the Airline Deregulation Act. Fort Worth, Dallas, the DFW Airport Board, American Airlines, Congressman Jim Wright (then House Majority Leader and representative from Fort Worth), and others acting in concert with them filed objections to Southwest's application with the CAB. However, the CAB awarded Southwest permanent

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[3] This defeat did not deter the Cities of Dallas and Fort Worth, the DFW Airport Board, or the DFW air carriers from other efforts to expel Southwest from Love Field. Each attempt, however, was rebuffed by the federal courts. *See, e.g., Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

authority in the Dallas (Love Field) – New Orleans market in 1979. Order 79-6-187, CAB Dockets 33777, *et al.* (June 28, 1979).

II. PASSAGE OF THE WRIGHT AMENDMENT

Their failure before the Civil Aeronautics Board prompted the Dallas/Fort Worth parties to turn to Congress, in an effort to change the law and to restrict service at Love Field. Majority Leader Wright offered an amendment to an unrelated aviation bill under consideration by the House, which would have *prohibited*, as a matter of federal law, *all commercial interstate air service* at Love Field. The Senate failed to agree to this amendment, however, and the matter was referred to a conference committee.[4] After lengthy negotiations, a legislative compromise was struck. This legislation, known as the Wright Amendment (Section 29 of the International Air Transportation Competition Act of 1979, Public Law 96-192), was described by the Conference Committee as "a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years." Senate Conference Report No. 96-531, 96th Cong. 1st Session, at 24.

Subsection (a) of the Wright Amendment prohibited (except as provided in subsection (c) of the Amendment) the federal government from authorizing any interstate service at Love Field, except for a small quota of charter

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[4] *See* discussion in the Department of Transportation's *Love Field Amendment Proceeding*, Order 85-12-81 at 3 (December 31, 1985) (DFW Airport Board Pet. App. 11), *aff'd, Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988).

flights and an allowance for commuter air carriers operating aircraft with no more than 56 seats. Subsection (b) allowed Southwest to continue its existing interstate (New Orleans) service at Love Field, but prohibited airlines from offering other interstate services at Love Field except as specifically authorized by the Wright Amendment.

Subsection (c) carved out an exception to the ban on interstate service from Love Field involving planes with more than 56 seats. In subsection (c), Congress found it "consistent with the public convenience and necessity to authorize" carriers to provide service on planes of any size, including large jets, between Love Field and points in the four states contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico). This authorization was made subject to two additional restrictions, to ensure that airlines could not evade the law's intent to maintain Love Field as a "short-haul" airport. Under the Wright Amendment, subsection (c), an air carrier can offer the interstate service within the designated five state area provided: (1) the air carrier does not offer through service or ticketing with another air carrier; and (2) the air carrier "does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside [the five-state service area]."

III. PASSAGE OF THE SHELBY AMENDMENT

For almost 18 years the Wright Amendment governed and dictated the permissible air service from Love Field. The constitutionality of the Wright Amendment was upheld by courts of appeals as a legitimate exercise of the plenary power of Congress to regulate interstate

commerce. *Kansas v. United States*, 16 F.3d 436 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991).

As an act of Congress, however, the Wright Amendment was subject to modification by that body. In 1997, Senator Richard Shelby of Alabama, Chairman of the Senate Appropriations Committee, added an amendment to an otherwise unrelated aviation appropriations bill (the "Shelby Amendment"), which expanded the permissible geographic scope of service from Love Field to include three additional states: Kansas, Alabama, and Mississippi. The Shelby Amendment also modified the Wright Amendment to define the term "passenger capacity of 56 passengers or less" to include large aircraft (300,000 pounds or less gross weight), reconfigured to accommodate 56 or fewer passengers. Public Law 105-66, § 337 (1997). The Shelby Amendment became law on October 27, 1997.

IV. FORT WORTH'S LAWSUIT

Promptly after Congress passed the Shelby Amendment (but before the President signed it), the City of Fort Worth filed suit in the 48th Judicial District Court of Tarrant County, Texas seeking a declaratory judgment that the City of Dallas was contractually obligated to Fort Worth to prevent any air carrier from taking advantage of the Shelby Amendment. In addition to the City of Dallas, Forth Worth joined as defendants in Texas state court certain air carriers that were viewed as potential users of Love Field. It did not join the DOT, the agency responsible for administering the Wright and Shelby Amendments; nor did it join Southwest, the primary air carrier

at Love Field. Indeed, when certain of the defendants sought to add Southwest and the DOT to the proceeding as necessary parties, Fort Worth and the Intervenor Plaintiff American Airlines, Inc. succeeded in having them stricken from the suit.[5]

On October 15, 1998, the state district court granted a partial summary judgment for Fort Worth and its litigation allies, American Airlines and the DFW Airport Board, against Dallas, Continental Express, Inc. and Legend Airlines, Inc. In a brief order that did not include a supporting opinion, the court ruled that Dallas was obligated by the 1968 Concurrent Bond Ordinance to bar airlines at Love Field from operating additional services authorized by the Shelby Amendment and that federal law did not override the cities' agreement to restrict Love Field service. On December 16, 1998, the court made its judgment final. *See* FW Pet. App. 178.

On May 25, 2000, the Court of Appeals for the Second District of Texas at Fort Worth reversed the judgment of the district court and rendered a judgment denying the declaratory relief sought by the City of Fort Worth and American Airlines.[6] The state court of appeals held, in agreement with the Fifth Circuit here, that the restrictions on Love Field air passenger service contained in the Bond Ordinance are preempted by the ADA.

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[5] Volume 10 of the Record on Appeal 110.

[6] The Judgment of the Court of Appeals for the Second District of Texas at Fort Worth in Cause No. 2-99-098-CV, *Legend Airlines, Inc., et al. v. City of Fort Worth, et al.* appears in the Appendix to this Brief at page 5a.

V. THE DOT PROCEEDING BELOW

In August 1998 while Fort Worth's lawsuit was pending, the DOT instituted the *Love Field Service Interpretation Proceeding*, in order to "issue a ruling on the major federal law issues raised by the dispute" in the state court proceeding. DOT Order 98-8-29 at 1, August 25, 1998. The Department explained that, as the agency primarily responsible for administering the relevant statutes, it had a responsibility to rule on the federal issues underlying the Texas litigation, much as the Department had done in 1985 in the *Love Field Amendment Proceeding, supra*, n.4. The Department therefore requested comments from interested parties on five issues of federal law. Fort Worth Petition Appendix [FW Pet. App.] 53, 80-81. DOT Orders 98-8-29 and 98-9-5 (September 3, 1998).

On December 22, 1998, after receiving a large volume of comments by the parties who are now before this Court, as well as by other interested parties, the Department ruled on the five issues as follows:

> (1) The City of Dallas' proprietary powers as owner of Love Field do not allow it to bar air carriers from operating services authorized by the Shelby Amendment, and thus Fort Worth may not enforce contractual claims against Dallas that would force it to do otherwise.
>
> (2) Under the federal aviation preemption provision, the Wright and Shelby Amendments preempt any agreement between Dallas and Fort Worth to restrict air service at Love Field that is permitted by those Amendments.
>
> (3) The Shelby Amendment allows an airline to operate long-haul service from Love Field with

any aircraft having no more than 56 seats, including regional jets.

(4) The DFW use agreements may not be enforced to block a DFW signatory airline from offering interstate service at Love Field that is permitted by the Wright and Shelby Amendments.

(5) The Wright Amendment permits Continental Airlines and its subsidiary Continental Express to offer through service and ticketing from Love Field to points outside Love Field service area via Houston, so long as their flights from Love Field to Houston use aircraft with 56 seats or less.

See Order 98-12-27 (FW Pet. App. 53, 145-46).

The City of Fort Worth and the DFW Airport Board petitioned the DOT for reconsideration of its rulings on Issues One through Four. With respect to the question of preemption by the ADA and the Wright and Shelby Amendments, Fort Worth and the Airport Board argued that the DOT was precluded from deciding the question by the contrary summary judgment decision of the state district judge in the Fort Worth lawsuit. The DOT rejected this argument and issued an Order on Reconsideration that affirmed its prior rulings.[7]

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[7] The Order on Reconsideration, No. 99-413, is publicly available at 1999 WL 218767 (D.O.T.). It is also reprinted in the Appendix to the Petition for a Writ of Certiorari filed by American Airlines, Inc. at 128a.

VI. THE FIFTH CIRCUIT DECISION

Various of the parties to the DOT proceeding petitioned the United States Court of Appeals for the Fifth Circuit challenging some or all of the decisions on the five issues.[8] In its decision, the Fifth Circuit denied all of the petitions for review and affirmed the DOT Orders. *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir. 2000) (FW Pet. App. 53). The court of appeals considered and rejected the arguments of the City of Fort Worth, American and the DFW Airport Board that either the full faith and credit statute, 28 U.S.C. § 1738, or federal common law rules of preclusion foreclosed the DOT's consideration of the ADA or of the Wright and Shelby Amendments. 202 F.3d at 799-800 (FW Pet. App. 17-23). On the issue of the preemption of Section 9.5A of the Bond Ordinance, the Circuit held that the restrictions on Love Field operations imposed by that section constitute regulations which relate to routes, within the meaning of 49 U.S.C. § 41713(b)(1), the federal preemption provision of the ADA. 202 F.3d at 805 (FW Pet. App. 33). The court then held that, under the circumstances of Love Field and the DFW Airport, the Bond Ordinance ban on Love Field flights went beyond any exercise of proper local proprietary powers that had ever been upheld in the federal case law, 202 F.3d at 807 (FW Pet. App. 37), and that it was a preempted exercise of local regulation over interstate air routes. 202 F.3d at 808 (FW Pet. App. 38-39).

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[8] Southwest filed a petition in the Fifth Circuit seeking review of the DOT's decision on Issue Five – single-ticketing. That question is a subject of the DFW Airport Board's Cross-Petition in No. 99-1739.

With respect to the effect of the Wright and Shelby Amendments on the power of the City of Dallas to regulate interstate air travel at Love Field, the court of appeals held it unnecessary to consider whether those statutes "impliedly preempt the cities' ability to enforce the Ordinance," having found express preemption under the ADA. 202 F.3d 808, n.17 (FW Pet. App. 39).

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY DECIDED THE ISSUE OF ADA PREEMPTION.

It is elementary that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." *Western Air Lines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952, 955 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), quoting *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1010 (2nd Cir. 1977). Even before passage of the ADA, with its express preemption of local regulation of "price, route, or service,"[9] it was recognized that

> . . . the airport operator is circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest. The Court must "carefully scrutinize all exercises of local powers under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals."

[9] 49 U.S.C. § 41713(b)(1).

Western Air Lines, 658 F. Supp. at 958, *quoting British Airport Board*, 564 F.2d at 1011 (2nd Cir. 1977).

In the ADA, this concept of limited local authority was made explicit in Section 4(a)(1) and (3), which preempted state and local regulations relating to price, route or service of interstate air transportation, while recognizing the existence of traditional local "proprietary powers and rights." In the federal cases decided since enactment of the ADA, the exercise of those proprietary powers has been limited to cases of noise regulations, other legitimate environmental concerns, or demonstrated and documented situations involving groundside congestion of airports. *See, e.g., Alaska Airlines, Inc. v. Long Beach*, 951 F.2d 977, 984 (9th Cir. 1991) (allowing noise restrictions which did not "disfavor interstate commerce" and where benefits were not "illusory or insignificant"); *San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991) (disallowing noise restrictions as unjustly discriminatory, and noting that the FAA's interpretation of what constitutes unjust discrimination "will be upheld unless it is unreasonable"); *Western Air Lines v. Port Authority of New York and New Jersey, supra* (allowing 1500 mile perimeter rule at LaGuardia Airport, imposed by multi-airport proprietor,[10] in the interest of regulating ground congestion at the airport);[11] *Midway Airlines, Inc. v. County of*

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[10] Dallas is the proprietor of Love Field. It does not occupy a similar status with respect to DFW. *See* 202 F.3d 808, n.16 (FW Pet. App. 38).

[11] Contrary to the assertion in American's Petition (Am. Pet. 14), the rationale for the *Western Air Lines* decision was clearly the local interest in alleviating ground congestion. This is quite clear in the Second Circuit decision, which noted that the perimeter rule had been adopted "in order to reduce ground

Westchester, 584 F. Supp. 436 (S.D. N.Y. 1984) (allowing hourly limit on number of scheduled flights in light of compelling factual evidence of overcrowding of terminal). As the Second Circuit recently observed, an airport proprietor "may regulate only a narrowly defined subject matter – aircraft noise and other environmental concerns at the local level." *National Helicopter Corp. v. City of New York,* 137 F.3d 81, 89 (2nd Cir. 1998).

The Fifth Circuit's decision below is squarely within this tradition of the case law. Moreover, the court of appeals was careful to note that it was not attempting to chisel the list of proprietary rights in stone, holding that

> [t]he fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive. . . . We do not limit the scope of proprietary rights to those which have been previously recognized.

202 F.3d at 808 (FW Pet. App. 38).

Accordingly, the court of appeals was "open to assessing whether the restrictions in the Ordinance are

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congestion at LaGuardia." 817 F.2d at 222. The court then explained the reasoning that lead to the conclusion that a short-haul airport would have less congestion:

> The Authority believes that business travelers create considerably less airport congestion than vacationers and uses the perimeter rule to encourage the use of LaGuardia by business people, who often make relatively short trips. . . . *Id.*

Nothing in this decision conflicts with the Fifth Circuit's decision below. The Fifth Circuit does not deny the validity of a congestion-based restriction. 202 F.3d at 807 (FW Pet. 37). No one, however, has offered that as a reason for the restrictions on Love Field use in the Bond Ordinance.

reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest." *Id.* However, those parties who now urge this Court to review the decision below because of its supposed dire consequences for the country as a whole, were unable to suggest to the Circuit a single good reason under the particular circumstances of this case for recognizing the power of a city to set routes as Fort Worth proposed that Dallas do.[12] *Id.*

In its Order 98-12-27, the DOT considered one possible justification for local restrictions on service, and in so doing struck at the heart of American's whole argument on the significance of the decision below. Just as in its petition to this Court, so in its DOT submissions, American argued that, if the Bond Ordinance could not be enforced to impose greater restrictions on Love Field air service than those authorized by federal law, it would

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[12] Proprietary powers may only be exercised by the actual airport proprietor. *See, e.g., City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973) (city noise ordinance by non-proprietor city preempted); *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles,* 979 F.2d 1338 (9th Cir. 1992) (neighboring city had no authority to regulate airport of which it was not proprietor); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306, 1317 (9th Cir. 1981) (the entity which is the "owner, operator, and promoter" of the airport is its proprietor, and is the exclusive holder of whatever proprietary powers exist). An airport operator may not, as here, contract with a second airport proprietor to limit operations allowed by federal law at its own airport for the purpose of restricting competition. This would allow competing airport proprietors, by contracting to divide markets and restrict airline competition, to create an entire new class of "proprietary powers," borne exclusively of the desire for economic protectionism.

"frustrate efforts by other cities to create regional airports, efforts which assertedly require restrictions on airline service at existing airports." Order 98-12-27 (FW Pet. App. 92-93).

The answer to American's argument, given by the DOT in its Order, is also the answer to that same argument as made in American's Petition for a Writ of Certiorari. As the DOT noted,

> American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport. *CF. City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

Order 98-12-27 (FW Pet. App. 93).

American's only response to this entirely reasonable approach by the agency responsible for implementing federal aviation policy has been to express consternation that the reasonableness of a 1968 restriction should be judged in terms of present conditions. American has bemoaned this "shifting-sands ruling" (Am. Pet. 26), and asserted that it will undermine the certainty necessary for financing.

First, it should be noted that the evaluation by the DOT in 1998 of a restriction imposed in *1968* is more a matter of glacial movement than shifting sands. Financing in every enterprise is undertaken in light of the governing statutory framework, and that framework has existed under the ADA since at least 1978. The law even before deregulation required that all restrictions by an airport owner be reasonable;[13] and it is hardly reasonable to adopt American's rubric: When the reason for the rule ceases, the rule should go on anyway.

Analyzing the condition of DFW, now more than twenty-five years old and enjoying phenomenal success,[14] in terms of either a start-up airport or a failing one is ludicrous. Neither the DOT nor the Fifth Circuit made any decision that would foreclose local restrictions by a proprietor in the interest of a second start-up airport in an area, or that would prevent reasonable restrictions to save a failing established airport. Indeed, both are on record as suggesting the contrary proposition. Order 98-12-27 (FW Pet. App. 93); 202 F.3d at 808 (FW Pet. App. 37-38). However, those issues are not raised by this case

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[13] The DFW Airport has, in fact, flourished in the face of a string of federal court decisions, going back nearly thirty years, which have held that the Bond Ordinance cannot legally be enforced to exclude air service at Love Field as contemplated by its terms. The first such decision, recognizing Southwest's right to continue flying out of Love Field, came before DFW had even opened. *City of Dallas v. Southwest Airlines, Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

[14] In 1997, DFW had 60.5 million enplaned passengers, while Love Field had 3.4 million. FW Pet. App. 112 (Order 98-12-27).

and would be before this Court only as a matter of speculation.

As to the necessity of resolving the "conflict" between the decisions below and the decision of the Colorado Supreme Court in *Arapahoe County Public Airport v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), it is certainly true that the Fifth Circuit was concerned by the language of the Colorado opinion. Specifically, the court of appeals expressed the "fear that under the rationale of *Arapahoe*, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception" to preemption under the ADA.[15] However, the Circuit also noted that *Arapahoe* was distinguishable from the present case. In the Colorado action, the court did not find the local airport restriction to be a regulation of "rates, routes or service," while clearly the Fifth Circuit did in the case here. Moreover, in *Arapahoe*, the local authority was enforcing a restriction on a kind of aircraft that had never used the airport in question in the first place. Love Field, the court of appeals noted in contrast, has always accommodated passenger planes of all types. 202 F.3d at 807, n.15 (FW Pet. App. 36-37).

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[15] 202 F.3d at 807 (FW Pet. App. 36). Subsequent to the decision of the Colorado Supreme Court in *Arapahoe*, the Federal Aviation Administration ruled, upon the complaint of Centennial Express Airlines, that the restrictions at issue in that case were, among other things, preempted under the ADA. *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05 (August 21, 1998) (*aff'd*, FAA Order No. 1999-1, February 18, 1999), *petition for review pending* as No. 99-9508 (10th Cir. filed March 10, 1999). Any consideration by this Court of the issues raised by *Arapahoe* should come in the context of the decision of the Tenth Circuit.

Finally, as American itself notes, the decision in *Arapahoe* came in the context of restrictions involving Denver's *new* International Airport (Am. Pet. 12). The decision on Love Field came after more than a quarter century of operations out of the now well-established DFW International Airport. It also came after extensive federal legislation governing with great precision the permissible interstate flights out of Love Field.

Accordingly, *Arapahoe* and this case, however unlike in spirit, are distinguishable cases. Moreover, the unique character of Love Field, most particularly the specific attention accorded it by Congress in the Wright and Shelby Amendments, makes the present case a very poor choice should this Court be inclined to issue general instruction on the proper spirit to adopt in considering federal aviation preemption.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE COURT'S CONSIDERATION OF THE SCOPE OF ADA PREEMPTION, BECAUSE OF THE UNIQUE ATTENTION OF CONGRESS TO LOVE FIELD.

At least with respect to the geographical scope of service described in subsection (c) of the Wright and Shelby Amendments, it is clear that Congress intended to occupy the field entirely, and to prescribe the precise air service which could be provided from Love Field. Congress' specific determination of this issue leaves no room for a more restrictive limitation by the City of Dallas. This conclusion is supported by the words of the Wright and Shelby Amendments themselves; by published legislative

history; and by the historical context in which the Amendments were adopted.

Subsection (c) of the Wright Amendment constitutes an affirmative *grant* of authority ("it is found consistent with the public convenience and necessity to authorize . . . "). As the Conference Report on the Wright Amendment specifically stated with respect to subsection (c):

> Subsection (c) provides that the CAB, or its successor agency is empowered to authorize an airline to provide service only between Love Field and points in Louisiana, Arkansas, Oklahoma, and New Mexico on a turnaround basis. The section also contains a congressional finding that such service, and only Love Field service of this limited scope, is consistent with the public convenience and necessity. While specific route applications to provide this service will be passed on by the CAB, the conferees intend that the Board will consider only whether the applicant is fit, willing and able to perform the proposed transportation, and whether such transportation is within the scope of authority granted by this legislation. We anticipate that the Board will act expeditiously on any such applications.

Senate Conference Report No. 96-531, 96th Cong., 1st Session, at 25.

With respect to the balance between federal preemption and local proprietary powers, the Wright Amendment Conference Report went on to state:

> The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively,

> apply to the authority to serve Love Field on interstate flights authorized by the amendment.

Id. at 26. This language evidences a congressional intent to maintain the existing balance between the sections on preemption and proprietary powers insofar as they would affect operations at Love Field; and it makes the historical context of the rulings on Love Field service especially pertinent.

Some three months before the Wright Amendment was agreed to, the Civil Aeronautics Board had specifically decided how the preemption/proprietary powers balance must apply with respect to Love Field:

> D/FW, supported by American, argues that, in the exercise of its proprietary rights, confirmed by section 105(b)(1) of the Act, it may, in effect, veto certification of Southwest at Love Field. That argument is simply without merit. . . . Section 105(b)(1) was not intended to give airport operators additional proprietary rights, let alone veto power over Board decisions.

CAB Order 79-9-192 at 8-9 (Sept. 28, 1979).

Thus, in specifically authorizing service between Love Field and points within Texas, Louisiana, Arkansas, Oklahoma, and New Mexico, Congress understood that the exercise of proprietary powers could not be used "in effect, [to] veto certification of Southwest at Love Field." Congress could not have intended that its explicit finding that such service is "consistent with the public convenience and necessity" might be subject to review, modification, or rejection by a local airport proprietor. Indeed, if Dallas had the power in the exercise of its proprietary rights to deny access to Love Field for service authorized

by the Wright Amendment, there would have been no reason for the statute in the first place. For at the time of the Amendment, Dallas was in favor of no scheduled flights out of Love Field.[16]

When the 105th Congress undertook to amend subsection (c) of the Wright Amendment by adding the states of Kansas, Alabama, and Mississippi, it evidenced no intention to reduce the preemptive power of the affirmative grant of authority to provide service between Love Field and points within the designated states. The legislation itself states simply:

> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

Public Law 105-66, § 337(b). The Shelby Amendment Conference Report is similarly brief and straightforward with respect to the modification of subsection (c):

> In addition, the conferees have added bill language including additional states to be covered under section 29(c) of the International Air Transportation Competition Act of 1979.

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[16] The Fort Worth parties attempt to avoid the obvious preemptive force of the Wright Amendment, which governed Love Field operations for nearly 18 years, by the bizarre argument that this act of Congress was really nothing more than a private agreement, a means of settling lawsuits, and, in effect, a novation of the original Bond Ordinance agreements. Federal statutes, of course, apply whether one has agreed to them or not.

Congressional Record, October 7, 1997, at H8603, H.R. Conf. Rep. No. 105-313 (1997).

In enacting this modification of subsection (c) in 1997, the 105th Congress did nothing to imply that it intended its actions to be any less preemptive than were the actions of the 96th Congress in enacting the original version of subsection (c). On the contrary, Congress' intent on both occasions was consistent: A carrier meeting the requirements of subsection (c) may provide service between Love Field and the states specified therein, without hindrance from the City of Dallas, the City of Fort Worth, the DFW Airport Board, or anyone else proclaiming themselves to be exercising "proprietary powers."

Given this unique situation involving Love Field, in which the proprietors' rights are specially and specifically restricted by targeted acts of Congress setting out restrictions and authorizations relevant to no other airport in the country, this case appears especially unsuited for the broad rulings called for by the petitioners here. The decision of the DOT that Dallas cannot forbid what the Shelby Amendment authorizes is correct for reasons in common with other airport situations – ADA preemption and the necessity of currently reasonable rules. But it is also correct for reasons peculiar to this one place. Those factors must inevitably be read together.

III. THE DOT HAD THE LEGAL AUTHORITY TO HOLD ITS INTERPRETATION PROCEEDING AND TO ISSUE DECLARATORY RULINGS ON THE QUESTIONS RAISED.

On May 25, 2000, the state district court summary judgment which Fort Worth argues should have precluded the DOT decision below was reversed and judgment was rendered by the Texas state court of appeals in entire agreement with the DOT and the Fifth Circuit on the pre-emption issue. Accordingly, if the DOT is bound by the Texas state court determination in Fort Worth's lawsuit, as Fort Worth argues here, it is now bound to decide against Fort Worth. This fact may well lessen petitioner's enthusiasm for preclusion. Certainly it is beyond question that the DOT had the authority to institute the proceeding below and to decide the federal law issues raised. As the District of Columbia Court of Appeals observed in reviewing the Department's previous administration of the Wright Amendment:

> Naturally, the administration and enforcement of a statute call upon the agency charged with its execution to interpret it.
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> * * *
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> Here, Congress fashioned a specific provision which the agency (once CAB, now DOT) has been called upon to interpret.

Continental Air Lines, Inc. v. Department of Transportation, 843 F.2d 1444, 1449 (D.C. Cir. 1988). This view is consistent with the teaching of this Court that "the Department of Transportation has regulatory authority to enforce the federal aviation laws." *Northwest Airlines, Inc. v. County of*

Kent, Michigan, 510 U.S. 355, 371 (1994). For the Department to hand over administration of a federal statute regulating air transportation to a state district court would turn principles of federalism, comity, and separation of powers on their heads.[17] Nevertheless, Fort Worth, alone in this Court, argues that the DOT was compelled either by the full faith and credit statute, 28 U.S.C. § 1738, or by federal common law rules of preclusion to follow the summary judgment decision of the Fort Worth state district court denying the applicability of federal preemption.[18]

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[17] See, for example, the recent Director's Determination in *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05 (August 21, 1998), (*aff'd*, FAA Order No. 1999-1, February 18, 1999) at page 3:

> As an expert administrative agency, the FAA (along with the Secretary of Transportation (Secretary) in connection with certain economic issues) is charged with interpreting and implementing the Federal aviation statutes . . . Moreover, Federal courts, including the Supreme Court, have recognized the unique expertise of the FAA and the Secretary in interpreting the Federal statutory provisions at issue. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987); and *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994). The FAA is not bound to follow the reasoning of the Colorado Supreme Court's decision and has conducted a *de novo* review of the matters raised in the complaint.

[18] Accordingly, were the Court to agree with Fort Worth now, the case would go back to the DOT, which would be compelled to enter precisely the same order it did in the first place on the basis of the state court of appeals judgment.

Fort Worth first asserts that, once the state district court had issued its Final Judgment on December 16, 1998, the DOT was required to defer to that judgment under 28 U.S.C. § 1738, a statute which requires federal *courts* to give the same full faith and credit to a state court judgment as would the courts of that state. Of course, by its terms this statute is inapplicable to the proceeding below and did not bar the DOT from issuing its Declaratory Order. The statute applies to "federal courts" rather than federal agencies. *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3d Cir. 1991) ("federal administrative agencies are not bound by section 1738 because they are not 'courts' "). Further, even if the statute did apply, it would not have given preclusive effect in the federal agency proceeding to the state court judgment, because that judgment is not binding on all interested parties under Texas law. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996) (the decision of a state court can have no more preclusive effect in any federal proceeding than it would have in a state action).

Neither the DOT nor Southwest was a party to the state court proceeding, nor were they in privity with any party; and thus they would not be bound by the state court's judgment under Texas law. *See, e.g., Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983). In fact, the state district court *denied, at the urging of Fort Worth,* motions to join Southwest Airlines and the DOT to the state court action on the grounds that they were not "persons who have or claim any interest that would be affected by the declaration."[19] Thus, no

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[19] Volume 10 of the Record on Appeal 110.

interest of Southwest Airlines could have been adjudicated and foreclosed in that state court proceeding to which it was not a party. Certainly, it makes no sense to hold that a federal agency should be crippled in the task of administering the laws placed in its charge by Congress as the result of litigation with limited impact even within its own jurisdiction.

In light of the important federal interests at stake in the administration of the aviation laws, the court of appeals declined to hold common law preclusion applicable either. Nothing in the cases cited by Fort Worth argues for a contrary result. Indeed, the four cases cited by Fort Worth in support of something like a full faith and credit requirement for state decisions in federal agency proceedings[20] only demonstrate how far Fort Worth is off the mark.

Bath Iron Works Corp. v. Director, OWCP, 125 F.3d 18 (1st Cir. 1997), concerns the preclusive effect of a state workers' compensation agency determination on the extent of an employees' disability in a subsequent federal claim for workers' compensation benefits under the Longshore Act. *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), is the Second Circuit's rejection of the FCC's attempt to use federal courts as screening panels for its disputes. The Circuit held that the FCC was bound by a prior *federal* court judgment, which was itself based on the res judicata effect of a state court suit. *Deerfield* is a decision made on the basis of Article III considerations which have nothing to do with the present dispute. 992 F.2d at 428. *Midgett v. United States*, 603 F.2d 835 (Ct. Cl.

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[20] FW Pet. 22.

1979), considered the effect of a state court adjudication of death on the Army's obligation to pay death benefits. Similarly, in *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), the issue was the effect on the award of Social Security benefits of a Puerto Rican court's determination of paternity.

In all of the three cases – *Bath Iron Works, Midgett* and *Torres* – that could be considered even remotely relevant here, the state tribunals were acting on traditional state law issues. They were deciding the extent of injury, the fact of death, and paternity. They were not attempting to interpret federal statutes, nor was anyone proposing that they could preclude the relevant federal agencies from administering and interpreting their statutes in proceedings involving other parties. Indeed, as the court acknowledged in *Midgett*:

> A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court.

603 F.2d at 845.

Requiring the DOT to defer to decisions of state courts as Fort Worth argues would overturn years of orderly administration of the federal aviation laws and invite a Balkanizing of aviation decision-making through state and local court judgments. Such an outcome would turn long-established principles of federalism upside-down and wreak havoc with the centralized federal oversight that is essential for our national aviation system.

CONCLUSION

For the foregoing reasons, the Petition for Writ of a Certiorari of American Airlines, Inc. should be denied and the Petition for a Writ of Certiorari of the City of Fort Worth should be denied with respect to Questions 1 and 3.

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1. *The Wright Amendment*. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
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> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.
>
> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight

> between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

2. *The Shelby Amendment*. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
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> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94

Stat. 48 et. seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".

3. *Airline Deregulation Act*. The pertinent paragraphs of Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), as now codified at 49 U.S.C. § 41713(b), are as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

4. *28 U.S.C. § 1738*. Section 1738 of 28 U.S.C. provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-99-098-CV

Legend Airlines, Inc.; City of Dallas, Texas; Continental Airlines, Inc.; and Continental Express, Inc.	§	From the 48th District Court of Tarrant County (48-171109-97) May 25, 2000 Opinion by Chief Justice Cayce Dissent by Justice Dauphinot (p)
v.	§	
City of Fort Worth, Texas and American Airlines, Inc.	§	

JUDGMENT

This court has considered the record on appeal in this case and has determined that there is error in the trial court's judgment. We, therefore, order that the judgment of the trial court be reversed and that judgment be rendered denying the declaratory relief requested by appellees City of Forth Worth, Texas and American Airlines, Inc.

We also render judgment that the commuter airlines exception to the Shelby Amendment allows any airline operating any aircraft with a capacity of no more than 56 passengers and a gross weight of no more than 300,000 pounds to offer flights on that aircraft to or from Love Field without geographical limitation.

It is ordered that the appeal from the temporary injunction brought by Continental Airlines, Inc. and Continental Express, Inc. be dismissed.

It is further ordered that appellees City of Fort Worth, Texas and American Airlines, Inc. shall pay all of the costs of this appeal, for which let execution issue.

/s/

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(4) (3)

Nos. 99-1462 & 99-1745

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

In The

Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

* * *

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT LEGEND AIRLINES, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether The Fifth Circuit Decisions (I) That The Airline Deregulation Act Preempted An Alleged Agreement Between The Cities Of Dallas And Fort Worth To Restrict Service At Love Field, And (II) Whether The Proprietary Powers Exception 49 U.S.C. § 41713(b)(3) Does Not Allow Dallas To Impose Route Limiting Restrictions, Did Not Conflict With Other Courts Of Appeal?

II. Whether The Court Should Deny Fort Worth's Petition Because DOT Has Authority To Administer And Interpret Federal Laws Pertaining To Aviation And Neither 28 U.S.C. § 1738 Nor Common Laws Rules Of Issue Preclusion Bind DOT To A State Court Decision To Which It Was Not A Party?

LIST OF INTERESTED PARTIES

The petition accurately lists the parties to this proceeding.

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STATEMENT OF CASE

I. Introduction

For over 30 years, a handful of parties have attempted to prevent airline competition in the Dallas-Fort Worth marketplace. Fortunately for the people of Texas and across the nation, these parties failed in their multiple attempts to destroy Southwest Airlines. The anti-competitive campaign, however, continues as Petitioners fight to keep another new entrant carrier from operating.

If the single most important question in this case is as American Airlines, Inc. ("American") claims "whether the Airline Deregulation Act of 1978 ("ADA") preempts the authority of local governments to implement regional plans that allocate particular types of air traffic to specific airports," the answer is simply, yes. The ADA preempts local authorities from implementing plans that regulate "price, route, or service of an air carrier" with limited exceptions for an airport proprietor. Courts have consistently held that proprietary powers and rights are extremely narrow and require numerous factors to be met before specific and reasonable limited restrictions are allowed. Not only do Petitioners fail to demonstrate the requisite need for imposing restrictions, the type of restriction they seek, to limit airline service from Love Field to Texas and four contiguous states to prevent competition, is prohibited under all circumstances and is significantly more onerous than restrictions found at any other airport in the world. Petitioners' untenable argument that airport proprietors can restrict the routes, number of passengers on an aircraft, and whether airlines can offer connecting

flights, would usurp the authority of the ADA and wreak havoc on the national aviation system.

II. Relevant Facts

For many years, the cities of Dallas and Fort Worth each operated a local airport and fought over which airport should be the area's principal airport. In 1968, Dallas and Fort Worth agreed to create Dallas-Fort Worth International Airport ("DFW") as the metropolitan area's primary airport. As a part of their agreement, Dallas and Fort Worth jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("Bond Ordinance"), to fund DFW. In the Bond Ordinance, the cities agreed to take "legally permissible" steps to phase out "certificated air carrier" service at other airports in the area, including Love Field. They did not try to close the airport. They did not form a single authority to operate both DFW and Love Field. Instead, a new airport board was created to govern DFW, while the City of Dallas remained the sole proprietor of Love Field. When Southwest Airlines, then an intrastate-only airline, refused to move to DFW, Dallas and Fort Worth sued to require Southwest to move to DFW.[1] Ultimately the case

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[1] Those parties were trying to force Southwest to take the specific suicidal step of abandoning Love Field and moving to DFW, where American Airlines could "deal" with it.

> Southwest employees knew they were fighting for their survival. The battle over Love Field was a life-and-death situation for Southwest; had it been forced to move to DFW, it would have gone bankrupt. Southwest employees knew it, the cities of Dallas and

was heard by the United States Court of Appeals for the Fifth Circuit, which decided that Southwest had a federally declared right to the continued use of and access to Love Field despite the cities' arguments that this would violate their agreement. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974).

In 1978, Congress deregulated the airline industry by enacting the ADA, which divested the states and their political subdivisions of the power to economically regulate airlines. The ADA did this by barring states or local governments from enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).[2] After passage of the ADA, Southwest

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Fort Worth knew it, and the other airlines knew it. Kevin Freiberg & Jackie Freiberg, *Nuts! Southwest Airlines' Crazy Recipe for Business and Personal Success* 27 (1996).

[2] The ADA also instructed the Secretary to consider the following matters as being in the public interest:

- Placing maximum reliance on competitive market forces and on actual and potential competition
- Avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation
- Encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry

49 U.S.C. § 40101(a).

initiated interstate service at Love Field. Concluding that the ADA preempted Fort Worth and Dallas from enforcing a provision in the Bond Ordinance designed to prohibit interstate service at Love Field, the U.S. Civil Aeronautics Board ("CAB") granted Southwest the authority to offer interstate service. *Southwest Airlines Automatic Market Entry Investigation,* CAB Docket 34582, Initial Decision (June 28, 1979), Order 79-9-129 (September 28, 1979). Unable to block competitive services through the courts, American Airlines, Dallas and Fort Worth asked Congress to restrict Southwest operations to only intrastate service. Consequently, House Speaker Jim Wright of Fort Worth introduced a bill that would ban any airlines operating at Love Field from flying outside of Texas. Congress rejected this extremely limiting proposal to limit Love Field only to intrastate service and instead passed the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35 (1980) (the "Wright Amendment") that authorized: 1) flights on any type aircraft within Texas and its four contiguous states, Louisiana, Arkansas, Oklahoma, and New Mexico; and 2) flights to any airport on "aircraft with a passenger capacity of 56 passengers or less." In addition, it restricted the number of charter flights, through ticketing and certain advertising. Without this specific Congressional action enacting the Wright Amendment, no restrictions on air carrier operations would exist at Love Field. Carriers would be able to fly anywhere.

To address the importance of expanded airline competition, in 1997, Congress enacted the Shelby

Amendment, which amended the Wright Amendment.[3] The Shelby Amendment added three additional states (Mississippi, Alabama, and Kansas) to the four contiguous states service limitation, and clarified the meaning of the 56-passenger authority by specifying that airlines may provide unrestricted interstate service in aircraft reconfigured to carry no more than 56 passengers[4] as long as the aircraft does not exceed the gross aircraft weight of 300,000 pounds.[5]

American misleads the Court by claiming that the Bond Ordinance declares:

> Love Field not available as a point of origin or destination for scheduled long-distance flights, just as if Love Field did not exist . . . [n]o airline would operate long-distance flights from Love Field, and all could operate short-distance flights.

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[3] Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, § 337, 111 Stat. 1425 (1997).

[4] Congress considered a number of possible limitations on the proposed expanded operations at Love Field, including whether the cities should be able to have any control over Love Field expansion. The Congressional conference committee rejected a provision that would give Dallas authority to veto any new authority operated under the Shelby Amendment, as well as a proposal to provide the Fort Worth City Council with similar veto authority.

[5] Although Congress could have limited 56-seat jet aircraft to turboprops, or specifically excluded regional jets, it did not adopt these approaches. Instead, Congress chose a weight limit that includes the aircraft to be operated by Legend along with larger aircraft.

(American Pet. 24.) Contrary to American's statement that Dallas "has held Love Field open only for short distance flights within Texas and four contiguous states" (American Pet. 24), the Shelby Amendment expanded the Love Field service area to seven states and acknowledged that jets with restricted seating could be utilized to serve any market. Clearly, the service area restrictions and the 56-passenger authorization are in place because Congress put those restrictions on Love Field, not because of Dallas' proprietary rights. The Bond Ordinance does not contain any operational restrictions. It does not mention limiting flights nor does it mention short distance versus long distance flights. The only restrictions at Love Field are those imposed by the Wright and Shelby Amendments.

Under the authority of the Wright and Shelby Amendments, Legend Airlines, a start-up airline, proposed to offer service from Love Field to any airport in the country with jets reconfigured to seat no more that 56 passengers.

Before the President signed the Shelby Amendment into law, Fort Worth filed a lawsuit in Texas state court asking the court to render a judgment that Dallas must ban the types of interstate service at Love Field expressly authorized by the Wright and Shelby Amendments. Fort Worth, American and DFW sought to block service at Love Field proposed by Legend and Continental Express. Even though Fort Worth, DFW and American claimed that Legend's and Continental Express's proposed operations under the Shelby Amendment are not permitted,

they have not challenged operations initiated by Southwest under the authority of the Shelby Amendment.[6] Fort Worth, American and DFW do not explain how Southwest is able to operate its new "through ticketing" flights allowed by the Shelby Amendment while all other operations under that same statute are blocked.[7] The only explanation of how Southwest's Shelby Amendment service is permitted is found in the following article from The Dallas Morning News (December 3, 1997), "Crandall drops through ticketing opposition at Love":

> The head of American Airlines, Inc. indicated that the airline no longer opposes "through ticketing" from Dallas Love Field.

Apparently, American believes that it can decide which provisions of federal law it will accept and which flights are permitted at Love Field.

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[6] Upon passage of the Shelby Amendment, Southwest:

> began offering for sale connecting service between Love Field and both Jackson, Mississippi and Birmingham, Alabama. In addition, the Shelby Amendment has allowed Southwest, for the first time, to offer for sale service between Lubbock, Texas and Birmingham; between Amarillo, Texas and both Jackson and Birmingham; and between Midland-Odessa, Texas and Birmingham. This service was not previously available because the flights serving Lubbock, Amarillo, and Midland-Odessa all stopped at Love Field, because through and connecting service could not be offered beyond Texas and the four states contiguous to Texas.

Southwest Brief 13, *American Airlines v. Department of Transportation*, No. 99-60008, July 19, 1999.

[7] American has claimed that the Shelby Amendment was not valid because local parties did not agree to it. (Letter, July 6, 1998).

Petitioners' reluctance to take on Southwest is due in part to a court order arising out of a 15-year litigation campaign against Southwest. Petitioners have been bound since 1982 by a federal district court injunction that prohibits them from litigating in any other court "the validity, effect or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of [Southwest] to the continued use of and access to Love Field . . . "[8] That injunction, to which Petitioners agreed, was designed to end the years of litigation Petitioners and others had unleashed upon Southwest concerning its refusal to move its operations from Love Field to DFW when the airport opened in 1975. For years, Southwest was forced to fight an extremely costly legal battle (similar to Legend's current battle) on several fronts, in order to exercise its federally assured rights. The federal district court, seeking to bring closure to the issue of Southwest's right to operate at Love Field (which was previously upheld by that court in 1973 and affirmed by the Fifth Circuit in 1974, with certiorari denied in December 1974), stated in no uncertain terms that piecemeal litigation of the issue would no longer be tolerated. Instead, because the efforts of Petitioners and others were deemed to subject Southwest to "multiplicitous and further vexatious litigation" and to adversely affect Southwest's "finances, customer and business relationships, and shareholder interests," the court ordered that it, and it alone, would be the

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[8] *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678, 684 (N.D. Tex. 1975).

proper forum for any and all further litigation of the issues affecting Southwest's rights. *Id.*

It is therefore not surprising that Petitioners attempted to narrowly tailor their requested relief so as to avoid implicating the operations of Southwest, although they failed in their effort. The relief requested in the state court proceeding did directly affect, and in fact sought to preclude, Southwest's right to offer "through ticketing" from Love Field to Mississippi and Alabama – service that Southwest began immediately after the enactment of the Shelby Amendment. The state court's December 16, 1998 final judgment decreed that Dallas was "obligated to prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states," and it made no exception for the through ticketing service Southwest had by that time been offering for months.[9]

In 1998, several parties in the Texas litigation now before this Court asked DOT for assistance in settling the dispute. Because the resolution of the Texas state court case depended on the interpretation of federal aviation laws, and because DOT is charged with administering these laws, on August 25, 1998, DOT instituted a public interpretive proceeding to resolve the disputed issues. All parties fully participated in the four month interpretive proceeding. Fort Worth, American and DFW submitted approximately 45 documents (over 1000 pages) to the Department during this process.

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[9] *City of Fort Worth v. City of Dallas, et al.*, 48th District Court, Tarrant County, Texas, No. 48-171109-97.

On December 22, 1998, after notice and opportunity for comments by all affected parties, DOT issued rulings on the federal law questions and various procedural issues raised by the parties. DOT held that federal law barred Dallas from imposing the kind of route restrictions on Love Field flights sought by Fort Worth, American and DFW:

> an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field meet this standard.

(Pet. App. 105.)

Fort Worth, American and several other parties petitioned the Fifth Circuit for review of DOT's orders. The state court temporarily stayed its proceeding pending the Fifth Circuit's decision. On February 1, 2000, the Fifth Circuit affirmed DOT's orders on all grounds. The Fifth Circuit held that it was:

> open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under sec. 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exemption beyond its intended limited reach.

(Fort Worth Pet. App. 38.)

Fort Worth petitioned that decision to this Court on March 3, 2000. On April 5, 2000, Legend initiated service at Love Field. On May 1, 2000, American commenced Love Field service and filed its petition with this Court. Continental Express is scheduled to start Love Field-Cleveland service on June 1, 2000. At the same time, DFW operations continue to grow.

On January 27, 2000, the federal government filed suit against American and Fort Worth to enforce DOT Orders and to prevent them from interfering with operations authorized by the Wright and Shelby Amendments. In its Motion for Summary Judgment, the government stated:

> Fort Worth and American nevertheless continue to seek to impose restrictions on service at Love Field through the Texas state courts. In the past few months, their immediate goal has been to prevent Legend from commencing its planned operations from Love Field. This activity directly violates DOT's Order. Since the filing of this suit and the issuance of the Fifth Circuit's opinion, Fort Worth and American continue to violate DOT's order. Specifically, neither Fort Worth nor American has sought to dismiss or withdraw their state court suit, although they have had ample opportunity to do so, and Fort Worth continues its active involvement in the state court litigation. Accordingly, the federal plaintiffs bring this action pursuant to 49 U.S.C. §§ 46106 and 46107 to enforce DOT's Order. Plaintiffs specifically seek a permanent injunction barring American and Fort Worth from continuing to prosecute the state court litigation

> and directing them to dismiss or withdraw their state court complaint.

Memorandum in Support of Plaintiff's Motion for Summary Judgment. No. 3:00cv238-r. U.S. District Court, Northern District of Texas, Dallas Division (April 3, 2000).

Meanwhile, the Texas state district court judge ignored the ongoing DOT proceeding and all DOT documents addressing Love Field authorities and rendered a decision approximately one month after the interpretation proceeding was initiated. In a partial summary judgment opposed by Dallas (among others), the state court ruled that federal law did not preempt Dallas' ability to enforce an alleged agreement by local parties to restrict service at Love Field.

On May 25, 2000, the Court of Appeals for the Second District of Texas, Fort Worth reversed the lower court's decision holding that the ADA preempted the Bond Ordinance and that it was not within Dallas' proprietary rights to regulate routes at Love Field without legitimate justifications.[10] The court also found that Legend's and Continental Express's operations were authorized by the Wright and Shelby Amendments.

> Appellees argue that the courts in *Western Air Lines* and *City of Houston* approved route restrictions that are similar to the restrictions at issue here. Those restrictions, however, were not upheld to limit competition between airports, but because the airport proprietors had demonstrated that the restrictions were necessary to achieve legitimate airport goals – the prevention of congestion, "harsh environmental effects,"

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[10] *Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV.

and to prevent the shut down of operations at a neighboring airport. In contrast, there is no showing here that the Bond Ordinance restrictions are necessary to further any legitimate operational or safety goal, or to maintain the financial viability of DFW.[11]

REASONS FOR DENYING THE WRIT

I.

The Fifth Circuit Decisions (I) That The Airline Deregulation Act Preempted An Alleged Agreement Between The Cities Of Dallas And Fort Worth To Restrict Service At Love Field, And (II) That The Proprietary Powers Exception 49 U.S.C. § 41713(b)(3) Does Not Allow Dallas To Impose Route Limiting Restrictions, Did Not Conflict With Other Courts of Appeal.

The Fifth Circuit's decision does not conflict with the Second Circuit or deviate from its earlier decision in *City of Houston v. Federal Aviation Administration, et al.*, 679 F.2d 1184 (5th Cir. 1982). Petitioners' assertions to the contrary are inaccurate. Petitioners fail to demonstrate that the Love Field service area restrictions are a permissible exercise of proprietary rights.

The ADA's preemption provision set forth in 49 U.S.C. § 41713(b)(1), is expansive and must be interpreted "broadly." *Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 393 (N.D.Tex. 1995), citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Under the ADA, a state or political subdivision "may not enact or enforce a

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[11] *Id.* at 23-24.

law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . " This Court has recognized that the purpose of the broad prohibition in Section (b)(1) is to "ensure that States would not undo federal deregulation with regulation of their own." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). There is, however, a very limited exception to the preemption provision for proprietary powers. Proprietary powers may be the basis for limited restrictions only if such restrictions are "reasonable, non-arbitrary and nondiscriminatory." *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). It is inconceivable that any court would find a restriction that in certain directions limits operations to within 250 miles and also limits the number of passengers on each flight, through ticketing, charter flights, advertising and that intended to prevent airline competition, to be reasonable. Such limitations run contrary to the clear meaning of the ADA.

In the interpretive proceeding, DOT concluded that restrictions agreed to by Dallas and Fort Worth were preempted by the ADA and were not valid exercises of proprietary rights. The Fifth Circuit affirmed DOT's interpretation of the preemption provision and held that Section (b)(1) preempted any agreement by the cities to restrict service. The only proprietary interest served by such a burdensome restriction is the financial interests of Fort Worth, DFW, and American Airlines, which is not the type of proprietary power exempted from the preemption provision.

There are only two cases in which Circuit courts have upheld perimeter rules, *Western Air Lines* and *City of Houston*, and neither one of these cases conflicts with the decision reached in the present case. In fact, both cases serve to distinguish acceptable proprietary interests from those articulated by Petitioners. The differences between the Love Field service area and the perimeter rules at Ronald Reagan Washington National Airport ("National") and LaGuardia are glaringly apparent. In neither case did the Circuit courts hold that an airport proprietor could restrict service to "prevent" competition. Rather, *City of Houston* and *Western Air Lines* support the finding that Dallas may not implement the perimeter and aircraft size restrictions sought by Petitioners. For Petitioners to claim that National and LaGuardia perimeter rules are "virtually identical" to Congressionally mandated restrictions at Love Field is without basis in fact and law. (American Pet. 17.)

Other than the Bond Ordinance which required the phase out of service to the extent "legally permissible," no party has identified any other "agreement" between Dallas and Fort Worth restricting service at Love Field. Fort Worth refers to "the four state perimeter rule" (Pet. 11) as if there existed another restriction other than the Wright Amendment to limit service to Texas and the four bordering states. There is not. If such an "agreement" existed, neither Fort Worth nor its partners have described when and where it was modified to permit Southwest's operations under the Shelby Amendment.

In *City of Houston*, the Fifth Circuit found that the perimeter rule imposed by the Federal Aviation Administration ("FAA") at National was permissible in part

because the FAA, as an arm of the federal government, does not fit within the restrictions of Section 105 of the Federal Aviation Act, which removes control over routes, etc., from local airport proprietors. Furthermore, the court held, on independent grounds, that the FAA, as a multi-airport proprietor, had sufficient proprietary interest to justify the perimeter rule. Because the FAA is not governed by the same rules as a local proprietor, and because the FAA is a multi-airport proprietor, Fort Worth's reliance on this case is misguided.

As a proprietor of both National Airport and Dulles, the FAA justified a 1000-mile[12] perimeter rule that required nonstop long-haul flights to use Dulles International Airport ("Dulles"). This was done to control severe congestion problems at National Airport and to help the then floundering, underutilized Dulles.[13] As the Fifth

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[12] The perimeter rule was originally 650 miles; it was twice expanded and is now 1,250 miles. In the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Congress has decided to allow some flights beyond 1,250 miles.

[13] In attacking the National Airport 1,000 mile perimeter rule (before it was expanded to 1,250 miles), American in comments submitted to FAA argued that the rule was arbitrary by stating:

> The proposed rules impose substantial costs on the economy, the public and upon the airlines, and do so in a discriminatory manner. Under the perimeter rule, citizens from states outside the perimeter are deprived of nonstop access to National and forced to incur costs, accounting to hundreds of millions of dollars in total.

(September 22, 1981)

Circuit noted, "one could shoot off a cannon in the Dulles terminal at midday without a chance of hitting anyone." (*City of Houston*, 679 F.2d at 1191.) Such is not the case at DFW, one of the nation's busiest airports.

In addition, in implementing and adjusting the perimeter rule, the FAA solicited and received comments from the "public, members of Congress, federal agencies, state, municipal and local agencies, public organizations, private companies and interested individuals before it imposed its rule." *Id.* at 1188. If Petitioners believe that the "perimeter" rule applicable at National Airport serves as precedent for creation of a limitation at Love Field, they should note that the National Airport rule is codified in federal law (49 U.S.C. Section 49109). This section states:

> An air carrier may not operate an aircraft nonstop in air transportation between Ronald Reagan Washington National Airport and another airport that is more than 1,250 statute miles away from Ronald Reagan Washington National Airport.

Additionally, Congress again modified the National Airport perimeter rule when it recently enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("FAIR-21"), which allowed additional flights beyond the perimeter. The National Airport

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> There is no rational basis for this discrimination among cities, many of which compete vigorously with one another to attract business locations, conventions and vacation travel.

(May 19, 1981)

"perimeter" limitation is not mandated by local agreement or by a multi-airport authority but is controlled by federal law, as the Wright and Shelby Amendments control operations at Love Field.

In *Western Air Lines*, the district court upheld a 1500-mile perimeter rule[14] imposed by the Port Authority of New York and New Jersey at LaGuardia[15] made necessary by severe ground congestion at LaGuardia. 658 F. Supp. at 952. As a result of congestion on the ground and in the terminal, the Port Authority required that flights over 1500 miles were required to utilize John F. Kennedy International Airport ("JFK"), a then under-utilized airport, or Newark Airport. The court held that as a multi-airport proprietor of LaGuardia, Newark, and JFK, the Port Authority could, under its "extremely limited" proprietary powers, regulate ground congestion at its airports as that "would appear to be at the core of the proprietor's function as an airport." 658 F. Supp. at 956-97. Furthermore, the court noted that it must carefully scrutinize all exercises of local power to determine whether they are reasonable, non-arbitrary and non-discriminatory, to ensure that "impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *Id.* at 1019, *citing British Airways Bd. v. Port Authority of New York and New Jersey*, 564 F.2d 1002,

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[14] With a number of cities outside the perimeter grandfathered, including Denver.

[15] The rule contained no restrictions on aircraft size, number of seats, prohibition on through ticketing or advertising.

1011 (2nd Cir. 1977). Restricting service at Love Field, as the Petitioners would like to do, would inhibit the legitimate national goal of competition.

On appeal, the Second Circuit affirmed the perimeter rule as permissible "at least when enacted by a multi-airport proprietor." 817 F.2d at 226. This hardly supports Fort Worth's bold assertion that an asymmetrical perimeter rule (limited to 250 miles in some directions) with various other restrictions to ***prevent competition*** "fall squarely within the proprietary rights exemption." (Fort Worth Pet. 15.)

More recently, the Second Circuit held that a proprietor of a Manhattan heliport could impose restrictions on helicopter operations to regulate noise levels but could not regulate helicopter flight paths. *National Helicopter Corp. v. City of New York*, 137 F.3d 8 (2nd Cir. 1998). An airport proprietor may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary, and are reasonable. *See National Helicopter Corp.*, 137 F.3d at 89; *British Airways Board* at 1011. The Second Circuit found that the proprietary power exception "gives no authority to local officials to assign or restrict routes." 137 F.3d at 92.

The Second and Fifth Circuit have never established a rule as broad as Fort Worth and American suggest that would permit airport proprietors to protect a dominant airport from any competition. Rather the Fifth Circuit noted that:

> [the] Second Circuit upheld only the restrictions that were aimed at reducing noise or other environmental concerns at the heliport. Significantly,

> the court struck down the restriction on sightseeing routes, finding that "Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." *Id.* at 92.

Unlike the situation presented in *Western Air Lines* and *City of Houston*, where the multi-airport proprietors sought to reallocate some traffic from their thriving and congested airports to underutilized airports, Petitioners seek to impose an unreasonable and discriminatory perimeter rule at Love Field to protect the nation's second largest airport, DFW, and one of the world's largest carriers, American Airlines, from economic competition at the smaller airport.[16] The Fifth Circuit properly determined that Petitioners' rationale for seeking to block service at Love Field was not supported by the above cases.

In neither *Western Air Lines* nor *City of Houston* was there a limitation of aircraft weight and number of passengers allowed on aircraft. The only aircraft size and weight limitations imposed at National and LaGuardia Airports are imposed by the FAA, in its role as the federal agency responsible for safety and air traffic.

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[16] Some parties have referred to the four state service area as a "perimeter rule." Perimeter rules have historically been defined by exact mileage restrictions (1,250 mile National Airport Rule and 1,500 mile LaGuardia Airport perimeter rule). The Wright Amendment restrictions are uneven, varying from approximately a 250 mile perimeter rule to the east and north to a 700 mile perimeter to the west. In addition, the Love Field restrictions limit the number of passengers on each aircraft and the size of aircraft.

As support for their position that an airport proprietor can bar certain service to prevent competition between airports, Petitioners also erroneously rely on the Colorado Supreme Court's decision in *Arapahoe County Public Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). First, the issue in *Arapahoe* was whether the airport authority could prohibit scheduled air carrier service out of Centennial Airport, a reliever airport that had never before had scheduled passenger service. Consequently, the airport was not equipped to handle passengers as it did not have a terminal, baggage system, or passenger security system. *Id.* at 590. The question before the Colorado Supreme Court, whether a municipality must open an airport to scheduled service, is not at all analogous to Love Field. Love Field has accommodated scheduled air service for over 30 years on aircraft of all sizes, including Air Force One.

Moreover, in *Arapahoe*, the court found that the airport authority "is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge and where they can fly." *Id.* at 595. Thus, *Arapahoe* does not support Petitioners' contentions that Dallas can determine where airlines can fly. Nowhere does *Arapahoe* state that "[r]estricting classes of service at an airport, on the basis that does not discriminate among airlines, is part and parcel of a proprietor's right to control the size of its airports." (American Pet. 13.)

To the extent that *Arapahoe* expanded the scope of proprietor's rights in holding that the airport authority could proscribe scheduled passenger service, the FAA has

challenged the decision and determined that it was erroneously decided. *Centennial Express Airlines, et al. v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1. Consistent with DOT rulings and the Fifth Circuit decision, the FAA found that the airport proprietor does not have the authority to force scheduled service airlines to use Denver International Airport instead of Centennial Airport. (The FAA's order is currently under review in the Tenth Circuit. *Arapahoe County Public Airport Authority v. FAA*, 10th Cir. No. 99-9508.)

Because no conflict exists among the Circuit courts and Courts of Appeals, this Court should deny American and Fort Worth's Petitions for a Writ of Certiorari.

II.

The Court Should Deny Fort Worth Petition Because DOT Has Authority To Administer And Interpret Federal Laws Pertaining To Aviation And Neither 28 U.S.C. § 1738 Nor Common Laws Rules Of Issue Preclusion Bind DOT To A State Court Decision To Which It Was Not A Party.

As an initial matter, it is necessary to clarify Fort Worth's misleading statements that imply that DOT "relitigated" a case after it received an unfavorable decision in state court. Although Fort Worth would like the Court to believe that DOT instituted the interpretation proceeding **after** the Texas state court rendered a decision, such is not the case. DOT instituted the interpretation proceeding following numerous requests by the parties for guidance in Love Field issues while the state trial court proceeding (to which it was not a party) was pending. The state court erroneously failed to recognize

DOT's primary jurisdiction in aviation regulation, an area in which the Fifth Circuit noted "federal concerns are preeminent and where DOT is charged with representing those concerns." (Pet. App. 21.)

Moreover, on May 25, 2000, the Court of Appeals for the Second District of Texas, Fort Worth reversed the state court decision upon which Fort Worth relies. *See Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV. The Fort Worth Court of Appeals held that the ADA pre-empted the bond ordinance, that it was not within Dallas' proprietary rights to regulate routes at Love Field without legitimate justifications (which were not articulated by Fort Worth, American or DFW) and that Legend's and Continental Express's operations are authorized under the Wright and Shelby Amendments.

A. The Supremacy Clause Prohibits Fort Worth From Gaining Advantage By Obtaining A Friendly State Court Judgment As A Means Of Usurping Federal Authority Over Aviation Matters.

The attempts of Fort Worth, DFW and American to wrest control over air carrier operations through local litigation fails (except as an improper and expensive delay tactic) because it violates the Supremacy Clause of the U.S. Constitution. *See* U.S. CONST. art. VI, cl.2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby . . . "). Under the Constitution, any state law that frustrates or conflicts with the lawful objective of a federal statute must yield. *See United States v. Composite State Bd. of Med. Examiners*, 656 F.2d 131, 135 n.4 (5th Cir. 1981).

The Supremacy Clause protects efforts by federal agencies to administer and oversee the implementation of federal statutes. *See, e.g., NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320-21 (3d Cir. 1991). In fact, federal supremacy is particularly vital when applied to the ADA because the ADA's broad preemption provision effectuates Congress' goal of ensuring that local governments do not "undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

Federal aviation policies and regulations are matters of particular federal concern. *See New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 175 (1st Cir. 1989). The national aviation system cannot function without uniform and nationwide oversight by DOT. *See New England Legal Foundation*, 883 F.2d at 171, 175. Moreover, the ADA's goals of fostering competition for the benefit of the traveling public cannot be accomplished in a balkanized patchwork of local regulations and interests. *See* 49 U.S.C. § 40101(a)(4), (9), (10), (13), (14). DOT thus occupies the unique role of ensuring that competition works without undue local interference. *Morales*, 504 U.S. at 378.

Because of DOT's Congressionally delegated authority to administer and enforce federal policies related to aviation, including policies fostering competition, its decisions regarding the Shelby Amendment, Wright Amendment, and the ADA must supercede any contrary decision by a state court. *See Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979). The state court has no authority over federal aviation policy. *See American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972). Under

the Supremacy Clause, DOT properly initiated, considered, and concluded the interpretation proceeding, without regard to the pending lawsuit in Texas.

B. The Full Faith And Credit Statute And Common Law Rules Of Issue Preclusion Do Not Bind DOT To A State Court Decision To Which It Was Not A Party.

Under 28 U.S.C. § 1738, a federal court is required to give full faith and credit to a state court ruling. This Section of the Code does not apply to federal agencies. *See NLRB v. Yellow Freight Systems*, 930 F.2d at 320 (giving preclusive effect to state judgments would compromise agency's uniform enforcement of federal policies). Cases cited by Fort Worth on Section 1738 and common law issue preclusion are distinguishable from the present case.

In support of its assertion that Section 1738 should apply to federal agencies, Fort Worth wrongly relies on *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18 (1st Cir. 1997) and *Town of Deerfield v. FCC*, 922 F.2d 420 (2nd Cir. 1993). Although the court in *Bath Iron Works* explained that the policy arguments for applying 28 U.S.C. § 1738 to both federal courts and federal agencies tend to be the same, the reasoning of the case focuses on a federal agency giving preclusive effect to a state agencies' prior decisions. To support this conclusion, the court cited a number of cases holding that a federal agency is normally bound to respect findings by another agency acting within its competence. The agency/agency relationship present in *Bath Iron Works* is not present here.

Furthermore, in *Bath Iron Works*, the court explained that "the point of collateral estoppel is that the first determination is binding not because it is right, but because it is first – ***and was reached after a full and fair opportunity between the parties to litigate the issue.***" *Id.* at 22 (emphasis added). DOT was not a party to the state court action and therefore, the Fifth Circuit's decision not to give preclusive effect to the Texas state court judgment was consistent with the policies underlying the doctrines of collateral estoppel and *res judicata*.

Similarly, Fort Worth mistakenly argues that the decision in *Deerfield* supports the proposition that Section 1738 should apply to federal agencies. First, the Second Circuit held that the FCC was bound by a prior *federal* court judgment, not a *state* court judgment. Second, the *Deerfield* court explained that "to accord full faith and credit to a given state-court judgment, the subsequent court must give a prior state court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was entered." *Id.* at 429. Implied in this conclusion is the assumption that the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in state court.

DOT properly declined to give the state court judgment preclusive effect. As the Fifth Circuit held:

> [t]o allow the state court effectively to foreclose the administering agency from further consideration of the Shelby Amendment as to the parties which appeared before the state court would trump the key federal interests that motivated

> Congress to create DOT and give it authority over these laws.

(Pet. App. 22.)

The Fifth Circuit recognized that the state court decision would permit local parties to usurp federal authority and would have the disastrous effect of fragmenting the federal aviation regulatory scheme.

CONCLUSION

For the reasons given above, this Court should deny Fort Worth's Petition for a Writ of Certiorari.

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Nos. 99-1462, 99-1739 and 99-1745

In the Supreme Court of the United States

CITY OF FORT WORTH, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

AMERICAN AIRLINES, INC., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the City of Dallas is precluded by the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), or by two subsequent Acts of Congress, the Wright and Shelby Amendments, from restricting routes and services operated by airlines from its Love Field airport.

2. Whether agreements between the Dallas-Fort Worth International Airport Board and various airlines, which provide that the airlines will not use competing airports such as Love Field without the Board's permission, are preempted by federal law.

3. Whether the Department of Transportation was bound by a state court judgment, recently reversed on appeal, in a suit brought by the City of Fort Worth against the City of Dallas, to which the United States was not a party and in which the state court interpreted federal statutes governing Love Field service.

4. Whether the Department of Transportation correctly construed the Wright and Shelby Amendments as permitting "through service" from Love Field when the initial portion of the trip is to another location within Texas and is made on an aircraft with a capacity of no more than 56 passengers.

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In the Supreme Court of the United States

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CITY OF FORT WORTH, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 202 F.3d 788. The orders of the Department of Transportation (Pet. App. 53-177) are unreported.[1]

[1] "Pet. App." refers to the appendix to Fort Worth's petition for a writ of certiorari (No. 99-1462). "FW Pet.," "AA Pet.," and "DFW Pet."

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-52) was entered on February 1, 2000. The petition for a writ of certiorari in No. 99-1462 was filed on March 3, 2000. The petitions for a writ of certiorari in No. 99-1739 and No. 99-1745 were filed on May 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the domestic airline industry. The Act, after a phase-in period, allowed each airline to operate from any commercial airport and to serve any domestic route without prior regulatory approval. To ensure that state and local governments would not replace federal regulation with regulation of their own, Congress included a preemption provision, which barred state and local governments from enforcing any law "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b); see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992). That provision, however, "does not limit" a state or local government that "owns or operates an airport" from "carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3).[2]

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refer to the petitions for a writ of certiorari filed by Fort Worth, American Airlines, and the Dallas-Fort Worth International Airport Board, respectively.

[2] Section 41713(b) provides, in pertinent part:

> Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Two subsequent Acts of Congress specifically govern airline service at Love Field airport in Dallas. The Wright Amendment, enacted in 1980, restricts interstate service at Love Field, but expressly authorizes certain service. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 48-49.[3] The Shelby Amendment,

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* * * * *

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

[3] The Wright Amendment (§ 29, 94 Stat. 48) provides, in pertinent part:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

* * * * *

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from,

enacted in 1997, expanded the scope of interstate service authorized at Love Field. Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1447.[4]

The Department of Transportation is responsible for administering the preemption provisions of 49 U.S.C. 41713. See 49 U.S.C. 40113(a) (Secretary of Transportation may take whatever action he "considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders"); 49 U.S.C. 46101(a)(2); see also *American Airlines* v. *Wolens*, 513 U.S. 219, 229 n.6, 234 (1995) (Department of Transportation is the "superintending agency" and "experienced administrator" of the preemption provision). The Depart-

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and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

[4] The Shelby Amendment (§ 337, 111 Stat. 1447) provides, in pertinent part:

(a) IN GENERAL.—For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXEMPTION.—The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 *et seq.*) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

* * * * *

ment is also responsible for administering and enforcing the Wright and Shelby Amendments. *Kansas* v. *United States*, 16 F.3d 436, 438 (D.C. Cir.), cert. denied, 513 U.S. 945 (1994); *Cramer* v. *Skinner*, 931 F.2d 1020, 1024 (5th Cir.), cert. denied, 502 U.S. 907 (1991); *Continental Air Lines* v. *Department of Transp.*, 843 F.2d 1444, 1448 (D.C. Cir. 1988).

In this case, the Department of Transportation, after soliciting and reviewing comments, issued a ruling interpreting those statutes. The Department concluded that Dallas may not restrict the routes and services that airlines provide from Love Field, either directly or by contract between the Dallas-Fort Worth International Airport Board (the DFW Airport Board) and an individual airline. Pet. App. 93-127, 133-141.[5]

1. For many years, the twin cities of Dallas and Fort Worth each operated their own airports, which competed to be the area's principal airport. Love Field was the local airport for Dallas. The cities resolved the dispute by agreeing to build Dallas-Fort Worth International Airport (DFW Airport). See *Cramer*, 931 F.2d at 1023. The cities' agreement, set forth in their 1968 Regional Airport Concurrent Bond Ordinance (1968 Bond Ordinance), required the cities to phase out virtually all interstate scheduled service at their local airports to the extent "legally permissible." Pet. App. 2-3, 58-61.

After DFW Airport opened, Dallas continued to operate Love Field. The interstate airlines moved to DFW Airport, but Southwest Airlines, then a new airline that provided service only within Texas, refused to move. After extensive litigation, Southwest Airlines won a judgment entitling it to

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[5] The DFW Airport Board is a local governmental body created and authorized under state law to be the owner and operator of Dallas-Fort Worth International Airport. Dallas appoints seven of the members of the 11-member Board. Pet. App. 58.

continue using Love Field for flights within Texas. See *Cramer*, 731 F.2d at 1023; Pet. App. 3.

Although Southwest Airlines initially operated only intrastate routes, after the enactment of the Airline Deregulation Act, the Civil Aeronautics Board ruled, over the objection of Dallas and Fort Worth, that Southwest Airlines could operate a Love Field-New Orleans route. *Cramer*, 731 F.2d at 1023. In response to that decision, Congress enacted the Wright Amendment, which was designed as a compromise between the two cities and Southwest Airlines. See H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979); Pet. App. 3-4, 64, 123.

The Wright Amendment restricts interstate scheduled passenger service from Love Field. Subsection (a) permits interstate flights from Love Field by aircraft having a capacity of no more than 56 passengers. Subsection (c) permits flights from Love Field to the four States bordering Texas—Louisiana, Arkansas, Oklahoma, and New Mexico—on aircraft of any size, but prohibits interline or through service. Pet. App. 3-5 n.1.[6] Dallas and Fort Worth did not attempt to block Southwest Airlines from adding interstate routes in accordance with the Wright Amendment. Nor did the cities amend the 1968 Bond Ordinance to reflect the Wright Amendment. *Id.* at 64-67.

In 1997, Congress enacted the Shelby Amendment, which expands the interstate service authorized at Love Field. The Shelby Amendment clarifies subsection (a) of the Wright Amendment as including large aircraft of up to 300,000 pounds gross aircraft weight if they are configured

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[6] Interline service is connecting service involving a change from one airline to another that is provided under agreements whereby each carrier agrees to accept tickets written for travel on it by the other carrier; the carriers provide for transfer of baggage between the flights. Through service is service provided between the origin and destination on a single ticket.

or reconfigured to have no more than 56 seats. The Shelby Amendment expands subsection (c) to add three more States —Mississippi, Alabama, and Kansas—to those to which service from Love Field is permissible on an aircraft of any size. Pet. App. 5-7 & n.2, 71-72.

2. After the enactment of the Shelby Amendment, Fort Worth sued Dallas in Texas state court, contending that Dallas was constrained by the 1968 Bond Ordinance from allowing the expanded service at Love Field authorized by the Shelby Amendment. *City of Fort Worth* v. *City of Dallas*, No. 48-171109-97 (Tarrant County Tex. Dist. Ct., filed Oct. 10, 1997). Fort Worth was supported by the DFW Airport Board and American Airlines, which has a major hub at DFW Airport. The Department of Transportation was not a party to that action. Pet. App. 148-149, 158-159.

In December 1998, the state court issued a judgment holding that Dallas was obligated by the 1968 Bond Ordinance to prohibit airlines from using Love Field to serve points outside Texas and the four States identified in the Wright Amendment. The court further held that federal law did not bar Dallas from regulating flights in that manner. Pet. App. 178-181.

Dallas, together with various airlines that planned to use Love Field, appealed. The state court of appeals stayed proceedings pending the Fifth Circuit's decision in this case. Pet. App. 7. After the Fifth Circuit issued its decision, the state court of appeals issued its own decision, which reversed the state trial court. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).

Meanwhile, Dallas sued Forth Worth and the Department of Transportation in federal court, seeking a declaratory judgment that Dallas may not bar airlines from operating interstate service at Love Field. *City of Dallas* v. *Department of Transp.*, No. 3-97CV-2734-T (N.D. Tex., filed Nov. 6,

1997). That action was stayed pending the resolution of this case. Pet. App. 7, 75-76.

3. While the state and federal court actions were pending, the Department of Transportation commenced a proceeding to interpret the federal statutes governing Love Field. Order No. 98-8-29 (Aug. 25, 1998). One week after the state trial court issued its judgment in *City of Fort Worth*, the Department issued its final orders on the statutory interpretation issues and various jurisdictional and procedural issues. Order Nos. 98-12-27 and 98-12-28 (Dec. 22, 1998) (Pet. App. 53-177).[7]

a. As a threshold matter, the Department determined that it has the authority to issue an order interpreting the relevant federal statutes, which it is responsible for administering and enforcing. Pet. App. 154-158 (citing, *inter alia*, *Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 366-367 (1994), and *Wolens*, 513 U.S. at 229 n.6, 234). The Department further noted that the dispute in this case "raises substantial federal issues that this Department should address." *Id.* at 155.

The Department of Transportation concluded that the pending state and federal court proceedings did not preclude it from issuing its interpretation of the federal statutes. The Department explained that, "[g]iven its responsibilities for administering those statutes, the Department should assist the parties by issuing its interpretation." The Department also observed that it was not a party to the state court action, and thus would not be bound by the ensuing state court judgment. Pet. App. 158-159.

b. On the merits, the Department of Transportation concluded that Dallas cannot impose the restrictions on interstate service from Love Field sought by Fort Worth (*e.g.*, a

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[7] The Department of Transportation subsequently reaffirmed the orders on reconsideration. Order Nos. 99-4-13 and 99-4-14 (Apr. 13, 1999).

prohibition on flights from Love Field to States other than the four identified in the Wright Amendment). The Department explained that those restrictions "are equivalent to route regulation." Pet. App. 103. As such, the restrictions are preempted by 49 U.S.C. 41713(b), which prevents state and local governments from enforcing laws "related to a price, route, or service of an air carrier," unless saved by its exception for actions of an owner or operator of an airport to "carry[] out its proprietary powers and rights."

The Department of Transportation noted that the courts have held that States and cities, as airport proprietors, may restrict airline service when "necessary to carry out a legitimate airport goal," such as to alleviate ground congestion, noise, or other environmental problems. Pet. App. 100. But the Department added that "[n]o court has held or suggested that one airport may adopt a perimeter rule [*i.e.*, a rule restricting the distance of flights to and from that airport] to protect a different airport from competition." *Ibid.*

Here, the Department of Transportation determined that the record did not establish that any "legitimate airport goal" would be advanced by the service restrictions sought by Fort Worth. The Department observed that the parties had not presented any evidence showing, for example, that the additional Love Field service authorized by the Shelby Amendment "would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport." Pet. App. 111. Indeed, the Department observed, the Wright and Shelby Amendments continue to impose substantial restrictions on long-haul Love Field services by barring the use of aircraft with more than 56 seats on flights outside Texas and a seven-state area. *Id.* at 112. The Department noted that the flights operated from Love Field, even after the Shelby Amendment, "will be a

small fraction" of the flights operated from DFW Airport. *Ibid.*[8]

In addition, the Department of Transportation concluded that, even aside from the express preemption provision of 49 U.S.C. 41713(b), the Wright and Shelby Amendments impliedly preempt the cities' regulation of service at Love Field. Pet. App. 120-127. The Department reasoned that "Congress has occupied the field" with respect to interstate service at Love Field and that "allowing the cities to restrict service would frustrate Congress' policies." *Id.* at 121.

c. The Department of Transportation concluded that the "use agreements" that the DFW Airport Board entered into with individual airlines are preempted by 49 U.S.C. 41713(b), to the extent that the agreements prevent the airlines from operating interstate flights at Love Field (or other airports in the Dallas-Fort Worth area) without the DFW Airport Board's consent. Pet. App. 133-141.[9] The Department explained that the DFW Airport Board cannot regulate airline routes by contract any more than Dallas and Fort Worth can regulate routes by ordinance. *Id.* at 135. The Department observed that the consent provisions in the use agreements "frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of

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[8] The Department of Transportation also found that Dallas was not a "proprietor" of DFW Airport, and therefore could not justify route restrictions at Love Field on the basis of its needs as the owner or operator of DFW Airport. The Department explained that, although Dallas chooses seven of the 11 members of the DFW Airport Board, Dallas does not control that Board, as reflected in the conflicting positions of Dallas and the Board in this proceeding and in the state court proceeding. The Department also noted that eight members of the DFW Airport Board must approve any decision granting an airline a waiver to use an airport other than DFW Airport for interstate service. Pet. App. 118-120.

[9] Although airlines may use DFW Airport without signing a use agreement, airlines signing a use agreement pay lower fees for the use of that facility. Pet. App. 139.

additional competition and additional service options." *Id.* at 139.

d. The Department of Transportation concluded that airlines may offer through service and ticketing from Love Field to points outside the seven-state service area established by the Wright and Shelby Amendments, if the through service involves (i) an initial flight on an aircraft with a capacity of 56 passengers or fewer from Love Field to another airport in Texas followed by (ii) a flight from that Texas airport to an ultimate destination outside the seven-state service area. Pet. App. 141-145. The Department explained that subsection (a) of the Wright Amendment contains no restriction on through service by aircraft with 56 seats or fewer; only larger aircraft are prevented, by operation of subsection (c), from offering through service and ticketing. The Department also noted that the Wright Amendment imposes no restrictions on intrastate service (*e.g.*, the initial leg of the contemplated travel). *Id.* at 142-143.

The Department of Transportation reasoned that a contrary approach would create a distinction that could not have been intended by Congress. The Department noted that the Wright and Shelby Amendments do not prohibit through service, the initial leg of which is a flight, on an aircraft with a capacity of 56 passengers or fewer, that begins at Love Field and ends in another State. The Department concluded that Congress did not intend a different result where the first leg of the through service was a flight that ended in Texas rather than another State. Pet. App. 145.

4. The court of appeals affirmed the Department of Transportation's orders. Pet. App. 1-52.

a. The court of appeals held that 28 U.S.C. 1738, the "full faith and credit" statute,[10] did not require the Department of Transportation to give preclusive effect to the judgment of the state trial court in *City of Fort Worth*. The court reasoned that Section 1738, by its terms, applies only to "court[s]," not to federal agencies. Pet. App. 17-19.

The court of appeals also held that the Department of Transportation was not required to give preclusive effect to the state trial court judgment as a matter of federal common law. Pet. App. 19-23. In resolving that question, the court weighed "the policies favoring full faith and credit, including repose and federalism concerns," against "the federal interests present here." *Id.* at 19-20. First, the court reasoned that the interests in repose were not strongly implicated, because the Department's proceedings were already well underway when the state court issued its judgment. *Id.* at 21. Second, the court reasoned that the national interests in this case are particularly strong, both because the case involves airline operations, a subject principally regulated by the federal government, and because Congress has twice specifically addressed aviation regulation with respect to Love Field. *Ibid.* Third, the court reasoned that requiring the Department to give preclusive effect to the state court judgment would produce "inconsistent results," because some of the parties before the Department were not parties to the state court proceedings. *Id.* at 22.

b. The court of appeals held that the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), bars Dallas from restricting interstate service at

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[10] Section 1738 provides, in relevant part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Love Field, as Fort Worth contended was required under the 1968 Bond Ordinance. Pet. App. 32-39.[11] The court noted that the parties did not seriously dispute that the restrictions "relat[e] to * * * routes" within the scope of Section 41713(b). *Id.* at 33. The parties disputed only whether the restrictions are within the "proprietary powers" exception to Section 41713(b) for actions of an airport owner carrying out its "proprietary powers and rights." *Ibid.* The court agreed with the Department of Transportation that the exception is inapplicable here. *Id.* at 37-39.

The court of appeals, consistent with other courts that have addressed similar issues, recognized that airport proprietors play an "extremely limited role in the regulation of aviation." Pet. App. 33-34 (internal quotation marks omitted) The court noted that airport proprietors have thus been permitted to adopt perimeter rules and similar route restrictions only to "alleviate an existing problem at the airport or in the surrounding neighborhood," such as airport congestion, noise, or other environmental concerns. *Id.* at 35. The court found that petitioners had failed to justify the restrictions on Love Field service as serving any comparable local objective. *Id.* at 37-38. The court concluded that the reallocation of flights between airports, "in and of itself," is not a sufficient objective to satisfy the proprietary powers exception. *Id.* at 38.[12]

c. The court of appeals also held that the use agreements between the DFW Airport Board and individual airlines are

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[11] The court of appeals found it unnecessary to decide whether the Department's preemption ruling is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court determined that the Department's ruling is correct even under a de novo standard of review. Pet. App. 31-32.

[12] The court of appeals declined to address the alternative grounds for preemption found by the Department of Transportation. Pet. App. 38-39 nn.16, 17.

preempted, to the extent that those agreements prevent an airline from providing interstate service at airports such as Love Field without the Board's consent. Pet. App. 43-47.[13] The court noted that government contracts are subject to preemption if they are an attempt by a state or local government to regulate. *Id.* at 44 (citing, *inter alia*, *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 226 (1993)). The count found that the use agreements, which were designed to implement the 1968 Bond Ordinance and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance," are an attempt to regulate airline service. *Id.* at 45. In view of the "overlap" between the use agreements and the 1968 Bond Ordinance, which the court had already held to be preempted, the court concluded that the use agreements are likewise "an impermissible attempt to regulate in an area where the federal government has preempted state regulation." *Ibid.*

d. Finally, the court of appeals affirmed the Department of Transportation's determination that an airline may, consistent with the Wright and Shelby Amendments, offer through service from Love Field to points outside the seven-state service area if the airline uses a Texas city as a connecting point and an aircraft with 56 seats or fewer to fly to the Texas connecting point. Pet. App. 47-52. The court held that the language of the Wright and Shelby Amendments is not dispositive, but that the Department's construction is permissible under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 50. The court explained that the Department could reasonably

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[13] Again, the court of appeals did not decide whether the Department of Transportation's ruling on this issue is entitled to deference under *Chevron*, because the court concluded that the ruling is correct under a de novo standard of review.

conclude that, because the Wright Amendment imposed an express prohibition on through service on large aircraft operating under subsection (c) but not on small aircraft (*i.e.*, those with a capacity of no more than 56 passengers) operating under subsection (a), Congress intended to permit small aircraft to operate free of such a prohibition. *Ibid.* The court also observed that the Department's construction of the Wright and Shelby Amendments as permitting through service where the initial flight is on an aircraft with no more than 56 seats is "not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some long haul service." *Id.* at 51.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court, any other court of appeals, or any state supreme court. This Court's review is therefore not warranted.

1. Petitioners Fort Worth (Pet. 13-19) and American Airlines (Pet. 11-27) challenge the court of appeals' ruling that 49 U.S.C. 41713(b), the express preemption provision of the Airline Deregulation Act, prevents the enforcement of the 1968 Bond Ordinance whereby Fort Worth and Dallas undertook to phase out interstate flights at their municipal airports. Section 41713(b) bars a city from enacting or enforcing any law "related to a price, route, or service of an air carrier," unless the city is acting, in its capacity as the owner or operator of an airport, to "carry[] out its proprietary powers and rights." 49 U.S.C. 41713(b)(1) and (3). Petitioners do not dispute that the 1968 Bond Ordinance is "a law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). But petitioners contend that the 1968 Bond Ordinance comes within the statutory exception as an exercise of the cities' "proprietary powers and rights."

a. The court of appeals and the Department of Transportation correctly concluded that Dallas would not be exercising "proprietary powers and rights," 49 U.S.C. 417123(b)(3), in restricting service at Love Field, at least absent a stronger justification for doing so than was offered by petitioners here.[14]

As the court of appeals recognized (Pet. App. 33-34), Congress has reserved an "extremely limited role * * * for airport proprietors in our system of aviation management." *British Airways Bd.* v. *Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977); see *City & County of San Francisco* v. *FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991) (observing that "[t]he federal government regulates aircraft and airspace pervasively," although reserving "a limited role for local airport proprietors" in certain areas), cert. denied, 503 U.S. 983 (1992). Any restriction on airline service that a state or local government, in its capacity as airport proprietor, imposes under Section 41713(b)(3) must be reasonable, non-arbitrary, and non-discriminatory. *National Helicopter Corp.* v. *City of N.Y.*, 137 F.3d 81, 89 (2d Cir. 1998) (citing *British Airways*, 564 F.2d at 1005). The few federal cases that have allowed an airport proprietor to allocate service between two airports primarily relied on the proprietor's need to relieve ground congestion, noise, or other environmental concerns. *Id.* at 88-89.[15]

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[14] The Department of Transportation also concluded that the proprietary powers exception of Section 41713(b)(3) is inapplicable, in any event, because Dallas is not the proprietor of DFW Airport, and thus cannot limit service at Love Field in aid of a propriety interest in DFW Airport. See Pet. App. 118-120; see p. 10 note 8, *supra*. The court of appeals found it unnecessary to reach that alternative ground for decision. Pet. App. 38-39 n.16.

[15] American Airlines cites statements made during the congressional debate on the Airline Deregulation Act that an airport proprietor could determine the "level and nature of service to be provided at airports." See

Petitioners did not advance any of those justifications for restricting airline service at Love Field. Nor did petitioners offer any other reasonable justification. Petitioners merely assert (FW Pet. 13) that DFW Airport might suffer some economic harm if additional flights are allowed from Love Field. But the Department of Transportation found that additional Love Field service would not undermine DFW Airport's position as the area's principal airport. See Pet. App. 56 (noting that "[n]o one has tried to show in this proceeding" that additional Love Field service would have such an effect). The Department's finding is clearly reasonable, especially given the Wright and Shelby Amendments, which continue to impose significant restrictions on Love Field service. As the Department noted, even if the currently proposed expansions in service occur, they would amount to a total of 360 daily flights at Love Field, "a small fraction of the 2,800 flights operated each day at DFW." *Id.* at 112-113.[16]

At bottom, petitioners are arguing that Dallas should be permitted to restrict business for Love Field simply to preserve business for DFW Airport—that is, to limit competition between the two airports in order to favor the airport

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124 Cong. Rec. 37,419-37,420, 38,526 (1978). The cited statements were made in response to specific inquiries about whether airports could continue to regulate service in order to deal with noise and other environmental problems. The statements thus do not support petitioners' claim of broad authority to limit routes and services.

[16] American Airlines also suggests (Pet. 20, 25-26) that the perceived need to limit flights from Love Field 30 years ago, when DFW Airport was established, is sufficient to justify protecting a thriving DFW Airport from competition today. But nothing in the text of Section 41713(b) suggests that a regulation, if once justified as a permissible exercise of an airport owner's proprietary rights, remains justified notwithstanding changed conditions. The Department of Transportation reasonably concluded that the relevant inquiry is whether a restriction is currently needed. See, *e.g.*, Pet. App. 111-113.

that petitioners prefer. The Department of Transportation properly concluded that such discriminatory restrictions "would be contrary to the very essence of deregulation, which is intended to promote competition." Pet. App. 106. This Court has observed that States and their political subdivisions may not, in light of the Airline Deregulation Act, impose "their own public policies or theories of competition or regulation on the operations of an air carrier." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995); see *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989) (in affirming the Department of Transportation's decision invalidating the fee structure imposed by an airport owner to discourage small aircraft from using its primary airport, the court observed that the proprietary rights exception is "not unlimited and is subject to curbing if it transgresses into the general field reserved for federal interest").

Petitioner American Airlines broadly predicts (Pet. 4-5, 11-12, 15, 18-27), without citing any factual or legal support, that the court of appeals' decision will introduce uncertainty into airport management, impede airports' ability to raise revenues in financial markets, and interfere with regional planning. But there is no reason to assume, based on American Airlines' assertions alone, that those predictions will prove accurate. To the contrary, the court of appeals did not purport to announce any new rule of law in this case; instead, the court simply affirmed the well-established rule that airports may not regulate airline routes and services, unless they demonstrate that such regulation is reasonable and necessary to protect their proprietary interests. The court did not suggest that, if a local airport authority could demonstrate that restrictions on service at one of its airports were necessary in order to preserve the economic viability of another of its airports, such restrictions would be impermissible.

b. Petitioners Fort Worth (Pet. 13-16) and American Airlines (Pet. 11-14) contend that the court of appeals' decision on the preemption issue conflicts with *Western Air Lines, Inc.* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *Arapahoe County Public Airport Authority* v. *Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). Petitioners are mistaken with respect to both decisions.

In *Western Air Lines*, the Second Circuit identified a specific problem—airport "congestion"—as a permissible reason for the Port Authority, as the proprietor of the three airports in the New York metropolitan area, to restrict long-haul flights to and from LaGuardia Airport. See 817 F.2d at 223. The Second Circuit thus did not, as petitioners suggest, recognize any general authority of local governments to allocate air traffic among airports that they own. Moreover, in its subsequent *National Helicopter* decision, the Second Circuit stated that the proprietary rights exception allows municipalities to regulate "only a narrowly defined subject matter—aircraft noise and other environmental concerns at the local level." 137 F.3d at 89. Significantly, *National Helicopter*, in disapproving local regulation of flight paths, stated that the proprietary rights exemption gives "no authority to local officials to assign or restrict routes." *Id.* at 92. There is no conflict between the Second Circuit and the Fifth Circuit on any issue presented in this case.[17]

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[17] Fort Worth also relies (Pet. 15-16) on *City of Houston* v. *FAA*, 679 F.2d 1184 (5th Cir. 1982), for the proposition that an airport proprietor may allocate long-haul and short-haul flights among its airports. In *City of Houston*, however, the federal government, not a state or local government, was the owner of the airports, Washington National Airport and Dulles International Airport. See *id.* at 1186. As the Fifth Circuit explained in this case (Pet. App. 35 n.14), the restrictions of Section 41713(b) do not apply to the federal government. Moreover, the court upheld the perimeter rule in *City of Houston* because it was a reasonable

In *Arapahoe*, an airport authority prohibited scheduled airline service at an airport where such service had never been offered. 956 P.2d at 590-591. The Colorado Supreme Court determined that the prohibition did not relate to airline services, fares, or routes, within the meaning of Section 41713(b), and thus was not subject to preemption. *Id.* at 594-595. Although the court went on to conclude that the prohibition came within the proprietary rights exception, *id.* at 595, that conclusion was not essential to the court's holding that the prohibition was not preempted. Here, in contrast, the Fifth Circuit was concerned with a restriction that indisputably *does* relate to services and routes. See Pet. App. 33 (court of appeals notes that there was "no significant argument" in this case that the 1968 Bond Ordinance related to airline services and routes). The Colorado Supreme Court expressly distinguished regulations that prohibit all scheduled passenger service at an airport, as in *Arapahoe*, from regulations that allocate long-haul and short-haul scheduled passenger service between or among multiple airports, as in *Western Air Lines* and this cases. See 956 P.2d at 595; see also *id.* at 596 n.12 (distinguishing the circumstances involv-

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means of reducing congestion at Washington National Airport and dealing with severe under-utilization of Dulles International Airport, which threatened its economic viability. 679 F.2d at 1191-1192. These proprietary objectives, however, have no application to this case. And, even if some tension existed between the decision below and *City of Houston*, this Court does not grant review to resolve intracircuit conflicts.

Fort Worth also identifies (Pet. 16-17) instances in which the Department of Transportation has considered the closing of local airports in favor of new regional airports. But the Department was acting in those instances in furtherance of its own responsibilities to administer federal aviation laws and airport programs. The decisions whether to close the local airports were not to be made by a local government unilaterally. Here, in contrast, the Department has determined that competition between the two airports in the Dallas-Fort Worth area serves the public interest and does not significantly harm DFW Airport.

ing the Centennial Airport in *Arapahoe*, "where scheduled passenger service has never been permitted," from those involving Love Field, where the proprietor sought to cut back on scheduled passenger service that had previously been offered). Accordingly, because the present case and *Arapahoe* differ so significantly in their facts and circumstances, they do not present any square conflict.[18]

c. In any event, even if petitioners' efforts to enforce restrictions on service at Love Field were not expressly preempted by Section 41713(b), they are impliedly preempted by the Wright and Shelby Amendments. The court of appeals found it unnecessary to reach that independent ground for preemption. Pet. App. 39 n.17. The Department of Transportation, however, concluded that the restrictions on Love Field service are preempted both expressly and impliedly. *Id.* at 120-127.

This Court has found implied conflict preemption "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *Geier* v. *American Honda Motor Co.*, No. 98-1811, slip op. 10 (May 22, 2000). That standard is satisfied here.

The Wright and Shelby Amendments prescribe, with specificity, the interstate service that airlines may provide at Love Field. Congress obviously did not intend in those amendments simply to give Dallas, as the proprietor of Love Field, the option to permit such service, if the city chose to

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[18] The dispute in *Arapahoe* is far from resolved. The Federal Aviation Administration recently determined that the airport owner could not ban scheduled service at the airport where the owner allowed comparable non-scheduled service. *Centennial Express Airlines* v. *Arapahoe County Pub. Airport Auth.*, FAA Order No. 1999-1 (Feb. 28, 1999). That decision is now on appeal to the Tenth Circuit. *Arapahoe County Pub. Airport Auth.* v. *FAA*, No. 99-9508.

do so. Rather, Congress sought to resolve the matter definitively. The Wright Amendment was thus described in the Conference Report as "provid[ing] a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years"—a "settlement" that "ha[d] been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Forth Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). The Shelby Amendment authorized additional service at Love Field. Congress ultimately excluded from the Shelby Amendment a proposed provision that would have given Dallas a veto over some aspects of that expanded service. See Pet. App. 126-127 (discussing provision). Congress's objective in the Wright and Shelby Amendments to allow specified interstate service from Love Field, if airlines choose to offer it, would be frustrated by local laws, such as the 1968 Bond Ordinance, that purport to disallow such service. Accordingly, as the Department of Transportation concluded, the Wright and Shelby Amendments impliedly preempt local laws restricting service at Love Field.[19]

2. Petitioners Forth Worth (Pet. 19-21) and DFW Airport Board (Pet. 12-20) challenge the court of appeals' holding that Section 41713(b) preempts the enforcement of the provisions of the Board's use agreements with individual airlines that prevent the airlines from using Love Field without the Board's consent.

As the court of appeals recognized (Pet. App. 43-47), the use agreements constitute regulation, by a local government

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[19] The Department of Transportation also concluded that local laws restricting service at Love Field are impliedly preempted because Congress sought to "occup[y] the field" of regulation of interstate service at Love Field. Pet. App. 121-122. See *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-634 (1973).

entity, of air carriers' routes and services. The relevant provisions of the use agreements "are essentially coextensive with the [1968 Bond] Ordinance," were designed to implement the service restrictions contained in the Ordinance, and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance." *Id.* at 45. Consequently, the court of appeals correctly held that the use agreements are preempted for the same reasons, and to the same extent, that the 1968 Bond Ordinance is preempted.[20]

Contrary to petitioners' assertions (FW Pet. 19-21; DFW Pet. 12-14), the court of appeals' decision does not conflict with this Court's decision in *Wolens* with respect to the reach of Section 41713(b). In *Wolens*, the Court held that Section 41713(b) "allows room for court enforcement of contract terms set by the parties themselves" in "suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 222, 228. There, the airlines themselves had imposed the contract obligations, which related to frequent-flyer programs for airline passengers. The Court concluded that Section 41713(b) did not preclude enforcement of those "privately ordered obligations." *Id.* at 228.

This case, in contrast to *Wolens*, concerns contract obligations that were imposed by a local government entity, not a private party, and that were designed to effectuate a local law, not private "business judgments." 513 U.S. at 229. The

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[20] Petitioner DFW Airport Board argues (Pet. 17-20) that, even if the 1968 Bond Ordinance is preempted, it does not follow that the use agreements are preempted, simply because those agreements refer to the Ordinance. But the use agreements do more than refer to the Ordinance. The purpose of the consent provision of the use agreements is to enforce a government policy by restricting airlines to the routes favored by the cities and the Board.

Wolens Court expressly distinguished such "state-imposed obligations" from the private obligations at issue in that case. *Id.* at 222, 228. Otherwise, a state or local government entity, such as the DFW Airport Board here, could readily circumvent Section 41713(b) by enforcing "price, route, or service" restrictions though contract, rather than through statute.[21]

Finally, although petitioner DFW Airport Board claims (Pet. 19) that the applicability of Section 41713(b) to use agreements between airport operators and individual airlines is "a far-reaching issue of nationwide importance," petitioners do not cite *any* decision of *any* court that addresses that issue.[22] The dearth of such decisions confirms that the issue is not, at least at this time, of sufficiently recurring significance to warrant this Court's review.

3. Petitioner Fort Worth contends (Pet. 22-26) that the Department of Transportation was required to give pre-

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[21] Petitioners note (FW Pet. 21; DFW Pet. 16) that this Court in *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218 (1993), drew a distinction, for purposes of implied preemption analysis under the National Labor Relations Act, between a State's acts in a regulatory capacity and a State's acts in a proprietary capacity. See also *Associated Gen. Contractors* v. *Metropolitan Water Dist.*, 159 F.3d 1178 (9th Cir. 1998) (case cited by petitioner DFW Airport Board drawing such a distinction with respect to express preemption analysis under ERISA). But such cases do not resolve the question whether the DFW Airport Board was engaging in regulation, as opposed to appropriate proprietary activity, in imposing a contract requirement that prevents signatory airlines from using Love Field without the Board's consent. Moreover, to the extent that the analysis of whether a state government's action is proprietary or regulatory is informed by whether private parties engage in such action, see *Building & Constr. Trades Council*, 507 U.S. at 228-229, private parties do not ordinarily dictate which airports an airline may use.

[22] We are informed by the Department of Transportation that very few other airports attempt to enter into use agreements that require an airline to obtain the airport's consent to use another airport in the area.

clusive effect to the state trial court's December 1998 judgment in *City of Fort Worth*, which held that the restrictions on Love Field service contained in the 1968 Bond Ordinance "are not preempted by federal law, and are valid and enforceable." Pet. App. 179. This issue may well be of no continuing significance. On May 25, 2000, the state court of appeals, which had stayed the appeal in *City of Fort Worth* pending the Fifth Circuit's decision in this case, reversed the trial court's judgment. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV, slip op. at 1-2, 30-31 (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).[23] In any event, contrary to petitioner Fort Worth's assertions, neither 28 U.S.C. 1738 nor federal common-law rules of preclusion required the Department of Transportation to defer to the state trial court's judgment.

Section 1738 provides, in pertinent part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken." Section 1738, by its terms, thus requires only that "court[s] within the United States," but not federal agencies, accord "full faith and credit" to the judgments of state courts. Consequently, the statute had no application to the Department of Transportation's administrative proceedings in this case. As the court of appeals noted (Pet. App. 17-18), the only other circuit that has fully considered the question reached the same conclusion. See *NLRB* v. *Yellow Freight Sys., Inc.*, 930 F.2d 316, 320 (3d Cir.) (Section 1738 did not require the NLRB to give preclusive effect to a state

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[23] The court of appeals concluded, *inter alia*, that "the restrictions on Love Field air passenger service contained in the [1968] Bond Ordinance are preempted by the [Airline Deregulation Act]." *Legend Airlines*, slip op. 30.

arbitrator's decision because the NLRB is an agency, not a court), cert. denied, 502 U.S. 820 (1991); cf. *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794-796 (1986) (Section 1738 governs only the preclusive effect to be given to judgments of state "courts," and thus does not apply to unreviewed state administrative decisions). The decision on which petitioner Fort Worth principally relies, *Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs*, 125 F.3d 18 (1st Cir. 1997), is not to the contrary. In that case, the First Circuit recognized, in accordance with *Elliott*, that Section 1738 had no application to that case, which concerned the preclusive effect to be given to a state administrative decision. The court instead relied on non-statutory preclusion doctrines in determining the effect to be accorded that decision. See *id.* at 21.[24]

As for common-law preclusion, this Court has declined to hold that the federal government is precluded by a prior adjudication in circumstances where doing so could undermine important national interests. See *Heck* v. *Humphrey*, 512 U.S. 477, 488-489 n.9 (1994) (citing *United States* v. *Mendoza*, 464 U.S. 154 (1984)). Such interests are implicated where, as here, preclusion would constrain a federal agency

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[24] Petitioner Fort Worth's other claims of a circuit conflict are equally without merit. In *Town of Deerfield* v. *FCC*, 992 F.2d 420 (2d Cir. 1993), the court of appeals did not hold that the FCC was required, by Section 1738 or otherwise, to defer to a state court judgment; rather, the court held that the FCC was required to accord preclusive effect to an earlier federal court judgment. In *Midgett* v. *United States*, 603 F.2d 835, 845 (Ct. Cl. 1979), the Court of Claims did not hold that the agency was required to give preclusive effect to a state court's decree of death; rather, the court stated that the agency should have considered the decree as prima facie evidence of death, suggesting that the decree was entitled to such treatment only because it was issued in a proceeding in rem. *Id.* at 846. The court ultimately held that the agency's decision was arbitrary and capricious, whether or not the state court decree was given full faith and credit. *Id.* at 846-849.

in interpreting statutes that Congress has charged the agency to administer. As the court of appeals observed (Pet. App. 21), this case "involves aviation regulation, an area where federal concerns are preeminent and where [the Department of Transportation] is charged with representing those concerns." More specifically, the case "involves the operation of flights from Love Field, a matter on which Congress has twice specifically legislated." *Ibid.* And the Department was not a party to the state court proceedings. In such circumstances, the Department was not required to defer to the determinations of a state trial court, with no expertise in, or responsibility for, aviation regulation, simply because the state court issued its (now reversed) decision one week before the Department issued its own decision.

4. Petitioner DFW Airport Board challenges (Pet. 20-29) the Department of Transportation's decision, affirmed by the court of appeals, that airlines may offer through service from Love Field to ultimate destinations outside the seven-state area, if the travel begins with a flight from Love Field to an intermediate Texas destination on a "commuter aircraft" (*i.e.*, one with a capacity of no more than 56 passengers). The court of appeals, after determining that Congress did not speak directly to this question, held that the Department reasonably interpreted the Wright and Shelby Amendments as allowing such service. Pet. App. 50. The court of appeals' application of the mode of analysis articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the particular facts and circumstances of this case does not warrant this Court's review.

Here, the Department of Transportation assumed, and no party disputed, that the Wright Amendment does not bar through service that commences with a flight on a commuter

aircraft between Love Field and a point outside Texas.[25] The only difference here is that the initial leg of the flight would be between Love Field and a point inside Texas. The Department concluded that Congress did not intend to treat Love Field flights on commuter aircraft differently, with respect to the availability of through service, depending on whether the flight ended inside or outside Texas. As the court of appeals held (Pet. App. 50-52), the Department's conclusion was reasonable and consistent with the Wright and Shelby Amendments.

The court of appeals' decision does not, as petitioner DFW Airport Board asserts (Pet. 24, 28), conflict with *Continental Air Lines* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1986). The two cases address different questions. In *Continental Air Lines*, the court of appeals affirmed the Department of Transportation's determination that the "through service" restriction in subsection (c) of the Wright Amendment did not prevent an airline from operating between Love Field and Houston, simply because the airline provided through service or ticketing with another carrier on its other flights. *Id.* at 1445-1154. The court also affirmed the Department's conclusion that subsection (a) of the Wright Amendment allows all airlines, not merely commuter airlines, to operate interstate flights from Love Field in aircraft with a capacity of no more than 56 passengers. *Id.* at 1454-1455. Neither issue is raised in this case.[26]

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[25] As the court of appeals explained (Pet. App. 50-52), subsection (a) of the Wright Amendment, which allows interstate service from Love Field on commuter aircraft, contains no restriction on through service; subsection (c), which does contain a prohibition on through service, does not apply to commuter aircraft, but only to "large jets" (*i.e.*, aircraft with a capacity of more than 56 passengers).

[26] Petitioner DFW Airport Board also notes (Pet. 21-22) that another portion of the Department of Transportation's order that was reviewed in *Continental Air Lines* concluded that an airline could not provide flights

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

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from Love Field, with an intermediate stop in Houston, to points outside the four contiguous States identified in the Wright Amendment. See Order No. 85-12-81, 1985 WL 57886, at *10-11 (Dec. 31, 1985). The Department's earlier ruling, which was concerned only with whether such service could be provided on large jets (*i.e.*, aircraft with a capacity of more than 56 passengers), construed subsection (c) of the Wright Amendment. The ruling in this case, which was concerned with whether such service could be provided on commuter aircraft, construed subsection (a) of the Wright Amendment. There is no inconsistency between the two agency rulings.

Supreme Court, U.S.
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NOS. 99-1739; 99-1745

IN THE

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,
Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

AMERICAN AIRLINES, INC.,
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition and Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF CONTINENTAL EXPRESS, INC.

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CORPORATE DISCLOSURE STATEMENT

Continental Express, Inc. is wholly owned by its parent, Continental Airlines, Inc., which is a publicly held corporation.

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IN THE

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Nos. 99-1739; 99-1745

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,
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THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

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On Petition and Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF CONTINENTAL EXPRESS, INC.

COUNTER-STATEMENT OF THE CASE AND THE ISSUE ADDRESSED HEREIN

The petition of American Airlines, Inc. in No. 99-1745 and the cross-petition of the Dallas Fort Worth International Airport Board in No. 99-1739 set forth essentially the same arguments concerning the preemption issue decided by the Fifth Circuit as are raised by the petition filed by the City of Fort Worth in its petition in No. 99-1462. On that issue,

Continental Express hereby adopts and reasserts the points made in its Opposition to the Petition for Certiorari filed in No. 99-1462.

The Cross-Petition of Dallas-Fort Worth International Airport Board and the Response of Southwest Airlines Co. to that cross-petition in No. 99-1739 raise an additional issue concerning the deference to be afforded the Department of Transportation in its interpretation of the Wright Amendment with respect to the carriage of through and connecting passengers on commuter airline flights operated at Love Field. Continental Express responds to this additional argument below.

REASONS FOR DENYING THE WRIT

Alone among the petitioners, the Dallas-Fort Worth International Airport Board ("DFW") has asked the Court to review the Fifth Circuit's affirmance of the Department of Transportation ("DOT") decision that the Wright and Shelby Amendments permit passengers on unrestricted flights by "commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" to operate between Love Field and points within Texas to connect to and from other flights without restriction, and Southwest Airlines Co. ("Southwest") has supported the DFW petition. Neither the DFW cross-petition nor the response presents any reason for this Court to review the Fifth Circuit's decision below.

First, the Wright and Shelby Amendments apply to flight operations at only one airport: Love Field. Thus, the Fifth Circuit's decision on through and connecting service applies only to flights operated at one airport and cannot be of such national significance to merit plenary review.

Second, unlike the other issues raised by petitioners, this through-ticketing issue was neither addressed in the Texas courts nor raised in the original Texas action brought by

Petitioners. Thus, there is no conflict between any Texas state court decision and the decision of DOT and the Fifth Circuit on this issue.[1]

Finally, knowing there is no issue of national importance involved, and knowing there is no state-federal conflict presented, DFW and its supporter, Southwest, seek to elicit grant of certiorari by creating a conflict between the Fifth Circuit and the D.C. Circuit where none exists.

When Congress adopted the Wright Amendment restricting service at Love Field, it permitted service at Love Field under two independent, alternative conditions: section (a) permits unrestricted flights at Love Field with relatively inefficient small commuter aircraft while section (b) permits large-aircraft operations restricted to a narrow geographic area without the ability to offer through or connecting service beyond that area. DFW and Southwest now argue, as they have done unsuccessfully before in court and at DOT, that these conditions are cumulative: operators of small aircraft must also be precluded from offering passengers through or connecting service. DFW and Southwest ask this Court to review this narrow issue based on erroneous arguments that the DOT decision affirmed by the Fifth Circuit conflicts with a prior D.C. Circuit decision deferring to DOT's previous,

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[1] There is also no longer a conflict between the DOT and Fifth Circuit decisions and decisions of the Texas courts regarding the scope of nonstop operations with commuter aircraft at Love Field or preemption of restrictions by the Airline Deregulation Act ("ADA") in light of the state appellate court's decision that flights on commuter aircraft can operate "to or from Love Field without geographical limitation" and that "enforcement . . . of the Bond Ordinance restrictions at Love Field is not a permissible exercise of proprietary powers under the ADA." (*See Legend Airlines v. City of Fort Worth*, No. 2-99-098-CV, Court of Appeals, Second District of Texas, Fort Worth, May 25, 2000 at 30-31, 25-26 (lodged with the Court).

similar, interpretations of the Wright Amendment and congressional intent in adopting the Wright Amendment.

In 1985, DOT noted that it "is clear that usual ticketing, scheduling and ratemaking practices would not be . . . affected, beyond the specific Love Field restrictions" and that "operations . . . using small aircraft are exempt from the [Wright] Amendment with respect to Love Field operations."[2]

Although DOT has concluded that operations with small aircraft are entirely exempt from the Wright Amendment's restrictions, it decided, in a separate section of its 1985 decision, that operators of *large* aircraft offering *intrastate* service at Love Field were not exempt from the Wright Amendment and could not "offer, promote or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point." (Order 85-12-81, App. 1 at 19a) because the service would cease to be "intrastate."

When the D.C. Circuit reviewed DOT's 1985 decision, and Southwest claimed then (as now) that "DOT's interpretation leaves a gaping loophole in the statutory scheme because it allows large airlines to use small aircraft as 'feeders' for interstate operations," the D.C. Circuit rejected Southwest's argument and concluded that the Department's interpretation was entitled to deference. (*Continental v. DOT*, 843 F. 2d 1444 at 1454 (D.C. Cir. 1988) When the D.C. Circuit affirmed the separate DOT conclusions regarding small commuter aircraft service and intrastate large aircraft service, it made no decision whatsoever precluding airlines operating

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[2] Order 85-12-81, App. 1 at 8a, 11a-18a. Although DFW included parts of DOT Order 85-12-81 in its Appendix, it omitted sections relevant to the issues raised here. Continental Express has therefore included a copy of the entire decision in its Appendix.

small commuter aircraft from offering through or connecting service on their Love Field flights.

Although the D.C. Circuit confirmed DOT's interpretation in part because it was consistent with the purpose of the Wright Amendment to limit Love Field to short-haul service, the primary basis for confirming DOT's interpretation was the D.C. Circuit's disagreement with Southwest's restrictive interpretation of the "commuter airline" definition. (*Continental v. DOT*, 843 F. 2d 1444 at 1454-1455. Subsequent enactment of the Shelby Amendment to permit operations at Love Field with larger aircraft (reconfigured to 56 seats or less) capable of offering nonstop service between Love Field and any point in the contiguous United States clearly evidences a more recent congressional intent to permit long-haul service at Love Field pursuant to the commuter exception in Section (a) of the Wright Amendment.[3]

There is simply no conflict between these two Court of Appeals decisions, rendered eleven years apart, with a further congressional directive regarding expanded operations by commuter aircraft enacted in the interval between the decisions.

DFW and Southwest have presented no reason for this Court to review the Fifth Circuit's decision that affirms DOT's interpretation that the Wright and Shelby amendments permit Continental Express to operate commuter aircraft at Love Field connecting to and from other flights at Houston. The statutory provision interpreted by DOT and the Fifth

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[3] As the Texas appellate court said in *Legend v. City of Fort Worth*, "A plain reading of the Shelby Amendment ... shows that congressional intent has shifted toward allowing commuter airlines to operate many types of aircraft out of Love Field that are capable of providing long-haul service. Appellees' narrow definition of commuter airlines would frustrate this clear intent and render the express language of the Shelby Amendment meaningless." (at 29)

Circuit is unique to Love Field; there is no conflict between DOT and the Fifth Circuit, on the one hand, and any Texas court decision, on the other hand; and there is no conflict between the D.C. Circuit and the Fifth Circuit on this issue. There is no reason for this Court to take review of this issue.

CONCLUSION

The petition in No. 99-1745 and the cross-petition in No. 99-1739 for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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May 31, 2000

APPENDIX

Order 85-12-81

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 31st day of December 1985

Docket 43307

LOVE FIELD AMENDMENT PROCEEDING

ORDER

By Order 85-7-65 (July 26, 1985), the Department requested comments on the interpretation of the Love Field Amendment (Amendment) (Sec. 29, International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35 (1980)), which restricts service by air carriers at Love Field, Texas.[4] Our request for comments followed announcement by Continental Airlines of its intention to commence service at Love Field and opposition of various persons to this service. On July 10, 1985, the Dallas/Fort Worth (DFW) Parties[5] submitted a letter to the Department's Office of Aviation Enforcement and Proceedings seeking an informal enforcement investigation and order prohibiting Continental's proposed service.

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[4] The question of proper interpretation of the Love Field Amendment was previously raised in the *Southwest Airlines – Muse Air Acquisition Proceeding*, where the Department found it unnecessary to reach the issue in its decision. Order 85-6-79 (June 24, 1985). We did, however, suggest that the issue should be resolved in another context. *Id.*

[5] The DFW Parties are the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth International Airport Board.

In view of the current dispute regarding Love Field service, and because the issue is primarily a question of law, we asked for comments to assist us in interpreting the Amendment. Responders were asked to specifically address the questions of whether an air carrier can serve Love Field on a non-interline basis, if the carrier interlines elsewhere on its system; and whether the Amendment applies to intrastate service. We received comments and reply comments from: Air Midwest, America West Airlines, Continental Air Lines, the Dallas/Fort Worth Parties, Delta Air Lines, the Department of Justice, the Regional Airline Association, Republic Airlines, and Southwest Airlines, Co., and several letters from the general public. In addition to comments concerning statutory interpretation, several parties raised related questions about marketing of Love Field services in a manner consistent with provisions of the Amendment. We have considered all comments and have also taken notice of Orders 80-3-9, 80-5-12, 80-8-181, and 80-12-102 of the Civil Aeronautics Board, the pleadings in *City of Dallas v. CAB*, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980), and the legislative history of the Amendment in interpreting its meaning.

After careful review of these matters, the Department has decided that: 1) Continental's proposed service between Love Field and Houston, Texas, does not violate the Love Field Amendment; 2) the Amendment does not apply to flights by intrastate carriers or intrastate service by an "air carrier"; 3) upon the request of passengers, Continental or its agents may sell "double tickets" to passengers continuing on a different aircraft and flight beyond an authorized destination from Love Field; 4) however, neither Continental nor its agents may list in any manner, including a computer reservation system, a flight from Love Field as a "connection" to a point beyond the Love Field authorized service area; 5) Delta, or any other airline, may list in its computer reservation system flights from Love Field by a

certificated carrier using small aircraft in the same manner as commuter carrier flights; and 6) intrastate and air carriers may provide service between Love Field and other points within the state of Texas so long as they do not use this service to avoid the Love Field Amendment's restrictions on interstate air service.

BACKGROUND

Since the completion of Dallas/Ft. Worth Regional Airport (DFW), which resolved a long-standing rivalry between Dallas and Ft. Worth for interstate service to their communities, the DFW Parties have sought to prohibit interstate service at other area airports. The DFW Parties, in fact, previously asked the CAB to prohibit interstate service at area airports other than DFW, especially Love Field. The CAB refused to do so. The DFW Parties' argument for this prohibition in the years immediately following completion of the regional airport was that interstate operations at Love Field would damage the viability of the new airport. *See* Order 79-9-192 (September 28, 1979).

In addition, the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1705 (1978)) substantially changed the Federal government's regulatory oversight of air transportation. In particular, the Act includes a provision, as part of the listing of public interest elements, concerning the use of satellite airports and the power of regional authorities over their use. Section 102(a)(6), 49 U.S.C. 1302(a)(6). Some members of the House of Representatives apparently believed this provision would prohibit the CAB from authorizing interstate service at Love Field, but the Conference Report on the subsequently passed Love Field Amendment indicates the Senate did not share this view. S. Rep. No. 96-531, 96th Cong., 1st Sess. (1980) [hereafter, Conference Report]. The Deregulation Act also includes provisions, known as the Automatic Market Entry (AME)

program, that allowed carriers to enter certain markets prior to complete route deregulation without a CAB finding that entry was needed. Section 401(d)(7), 49 U.S.C. 1371(d)(7). Under the AME provisions, the CAB ruled that Southwest Airlines could provide interstate service from Love Field, notwithstanding section 102(a)(6). Order 79-9-192 (September 29, 1979).

Congress subsequently addressed the dispute respecting service at Love Field in an amendment to the International Air Transportation Competition Act (IATCA). Congressman Jim Wright initially introduced an amendment to IATCA, passed by the House, that effectively prohibited all interstate air service at Love Field. However, the Senate version of IATCA contained no similar provision. The Conference Committee adopted a compromise solution to settle the controversy, producing the current Love Field Amendment. It rejected Congressman Wright's total ban on interstate air service at Love, but imposed substantial restrictions. Subsection (a) of the Amendment prohibits the CAB or its successor from authorizing interstate service (other than limited charter and commuter flights) to Love Field, except in accordance with remaining provisions of the Amendment. Subsection (b) prohibits interstate scheduled service at Love Field, except in accordance with other provisions of the Amendment, or if such service was operated before November 1979. This section assured that Southwest could continue to operate Love Field service the CAB had previously authorized. Subsection (c) defines the scope of permissible service as follows:

> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through

> service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such state. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, and any other officer or employee of the United States, or any other person.

Continental does not plan on operating from Love Field beyond the five-state area specified in (c), an action which would be clearly prohibited. Rather, Continental plans to serve Love Field with flights to Houston. Continental has interline agreements with other carriers and provides interline service at its Houston hub. Thus, in interpreting the Amendment, we must interpret the interline prohibition contained in (c)(1) to determine whether the Amendment should be construed to prohibit a carrier that interlines elsewhere on its system from serving Love Field, or whether it should be construed merely to prohibit interlining in connection with service at Love Field.

The Dallas-Ft. Worth Parties and Southwest argue that the Amendment prohibits service at Love Field by carriers that interline anywhere on their systems, even if no interline service is provided on flights serving Love Field. The Justice Department disagrees, arguing that Congress' intent in enacting the Amendment was to prohibit interlining only in connection with Love Field service. Justice notes that this view is consistent with prior CAB interpretations of section (c)(1).

The CAB's most detailed interpretation of the interline prohibition occurred in connection with an airport notice filed in 1980 by Texas International Airlines (TI) to inaugurate

interstate service from Love Field.[6] The airport notice was opposed by Southwest and the DFW Parties on the grounds that the Amendment prohibited Love Field service by interlining carriers, such as TI, even if the carrier did not provide interline service from Love.[7] The CAB disagreed and permitted TI to institute the proposed interstate service. Interpreting the Amendment as restricting interlining on flights serving Love Field, rather than as a total prohibition on serving Love Field by carriers that interline elsewhere on their systems. Order 80-8-181 (August 29, 1980).[8] The DFW Parties sought judicial review of that order. *City of Dallas v. CAB*, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980). The issue, however, was never resolved, because TI discontinued its Love Field service during the course of the appeal; and the case was dismissed as moot.

Continental's proposed service at Love Field is similar to the earlier service of TI approved by the CAB. The issues and positions of interested parties remain much the same as in TI's 1980 application. After careful review of comments, the plain words of the Amendment, and its legislative history, we have determined that the CAB properly interpreted subsection (c)(1) as only prohibiting interlining on flights serving Love Field. Thus, we find the Amendment does not prevent Continental from providing service between Love Field and Houston.

---

[6] TI was subsequently merged into Continental after its parent, Texas Air Corporation, acquired Continental.

[7] Unlike TI, Southwest, which had previously been authorized by the CAB to provide service at Love, did not interline with other carriers elsewhere on its system. Order 79-9-192 (September 29, 1979).

[8] In addition, the CAB found that the Amendment's restrictions, while statutory and clearly applicable without further regulatory action, should be embodied in certificates authorizing such service, as intended by Congress (Conference Report at 25). Order at 6.

OPERATIONS BY AN AIR CARRIER WITH INTERLINE SERVICE

The Department interprets the Amendment as not prohibiting non-interline service at Love Field by an air carrier that provides interline service elsewhere on its system. The DFW Parties, Southwest, and Republic, who do not agree with this interpretation, contend that we should first look to the plain wording of the Amendment to ascertain Congressional intent, unless the literal wording of the statute would lead to "unreasonable" or "incongruous" results. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). We do not disagree.

In examining the wording of the Amendment, it is clear that the critical part of subsection (c) is one sentence regarding service by "an air carrier" "on a *flight* between Love Field, Texas," and points in Texas and the adjacent four states. Subclause (1) prohibits "such air carrier" from offering or providing through service or ticketing with other carriers; and subclause (2) prohibits the carrier from offering for sale transportation to a point outside the authorized area, and serving such a point on a flight that also serves Love Field. In our view, the plain and literal meaning of subsection (c) refers to a specific "flight," and subclauses (1) and (2), which must logically be read together (the clauses are joined by the conjunction "and"), describe restrictions applicable to the flight. As further discussed below, the legislative history is not contrary to this plain reading; and this reading is not unreasonable. *See, Nat'l Small Shipments Traffic Conference v. CAB*, 618 F.2d 819 (D.C. Cir. 1980).

The DFW Parties and Southwest offer a significantly different reading of the literal words of subsection (c). Their proffered meaning rests on the assumption that subclauses (1) and (2) must be read separately. Under this interpretation, subclause (1) describes a class restriction, prohibiting any carrier that interlines elsewhere on its system from serving

Love Field; while subclause (2) describes an operational restriction, prohibiting this class of carrier from serving Love Field beyond Texas and the four-state area. Thus, the DFW Parties and Southwest contend that subsection (c)(1) is clear in its terms: a carrier that conducts any interlining operations is precluded from offering interstate service at Love. Moreover, under this interpretation, any conflict between subclauses (1) and (2) is illusory; since the DFW Parties and Southwest argue that it is logical to apply subsection (c)(1) universally, while applying (c)(2) only in connection with operations at Love Field.

The Board rejected this reading of subsection (c) as unreasonable, finding that provisions of the Amendment must be read in harmony. Order 80-8-181, at 4 (August 29, 1980). As the CAB stated, to agree with this interpretation of (c)(1) would require a reading of (c)(2) prohibiting an air carrier providing service at Love from providing any service outside Texas and the four adjacent states, even operations unconnected with Love Field service. *Id.*[9] This interpretation would be inconsistent with the statements of the Conference Committee that carriers providing interstate service at Love were not precluded from operating outside the five-state area, as long as through or connecting services to points outside the area were not offered in connection with the carriers' Love Field service. Conference Report at 25-26. It is also inconsistent with the remainder of subsection (c) and the rest of the Amendment, which envisions and regulates interstate service at Love Field. Further, the Conference Report specifically states that carriers' usual ticketing, scheduling, and ratemaking practices would not be otherwise affected. Id. To read the subclauses separately effectively undercuts the Amendment, suggesting that Congress enacted a self-

[9] While this outcome might be acceptable to the DFW Parties, Southwest would probably object.

defeating statute. As the CAB found, Congress intended that carriers providing interline services elsewhere on their systems could provide service at Love Field, as long as they did not provide interline service to points outside the five-state area in connection with their Love Field services. Order 80-8-81 at 5. We agree.

Moreover, our plain reading of the Amendment is supported by a customary understanding of English grammar. To support their interpretation, the DFW Parties and Southwest would have us change the conjunction between the subclauses from "and" to "or," in order to read the clauses separately. However, the clauses are joined together in one sentence as connected restrictions on permitted interstate service at Love Field and used as descriptive modifiers of the term "flight." A contrary reading is grammatically strained and leads to unreasonable and incongruous results, as noted above.

Nor can we accept the arguments of the DFW Parties and Southwest that the CAB improperly modified the language of the Amendment by somehow reading into subclause (1) the words "on a flight" "that precede that subclause. Interestingly, in urging their own interpretation, the DFW Parties and Southwest engage in the same type of error they accuse the Board of having made. Strained modification of language is not necessary to understand the plain meaning of subsection (c); subclauses (1) and (2) must be read together in the context of the entire sentence in which they appear.

All commenters, as well as this Department, believe the Amendment's legislative history supports their reading of the plain meaning of the provision. As discussed more fully below, we find that the legislative history, when reviewed as a whole, supports our interpretation of the Amendment. This finding is consistent with the views of Continental Airlines, America West, and the Department of Justice.

The DFW Parties and Southwest contend that the legislative history embodied in the Conference Committee Report supports their position that Congress intended to preclude from Love Field service carriers conducting any interlining elsewhere on their systems, citing the Conference Report at 24. These parties discount colloquy and statements on the floor of the House and Senate by members of the Conference Committee and floor managers of the legislation indicating that the Committee intended the interlining restrictions to apply only to Love Field service. They further suggest that the Amendment should be considered in the context of "broader" history, noting that the provision of the 1978 Airline Deregulation Act defining services at satellite airports as an element of the public interest was amended to provide that this should be the case only where regional airport authorities and plans supported the use of such satellite airports. They point out that Congressman James Wright assumed this amendment of the Deregulation Act would prohibit the CAB from authorizing interstate service at Love Field. When the Board subsequently authorized Love Field service, Congressman Wright introduced an amendment to the IATCA of 1979 that would have prohibited interstate service at Love. The House adopted this amendment, but the Senate version of IATCA included no comparable provision. While the DFW Parties and Southwest do not dispute that the current version of the Love Field Amendment was a compromise agreed to in conference, they nonetheless argue that Congress intended this provision to be very restrictive.

In our view, the legislative history, properly read, supports a less restrictive interpretation of the interline provision. The Conference Report begins by stating: "Section 29 as approved by the conferees embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field." Conference Report at 24. In addition, Congress clearly knew the extent of interlining practices among air carriers, since the Airline Deregulation

Act and IATCA itself (specifically sections 11, 14 and 15) contain provisions involving agreements and fares;[10] and the Report is clear that usual ticketing, scheduling, and ratemaking practices would not be otherwise affected, beyond the specific Love Field restrictions. Conference Report at 26.

The Conference Report continues: "Subsection c permits turnaround service between Love Field and points in the four contiguous states." The turnaround nature of the authorized flights is repeated in the next paragraph. The DFW Parties' and Southwest's analysis of legislative history focuses almost entirely on the following paragraph. While those parties contend that that paragraph indicates that carriers who interline anywhere on their systems are barred from serving Love Field, the paragraph, in fact, is merely a repetition of the words of the Love Field Amendment. The Conference Committee more fully explained the meaning of that language in the next paragraph – an explanatory paragraph the DFW Parties and Southwest have apparently ignored. That paragraph begins: "Thus, a carrier providing service from Love Field to a point in one of these states is not forbidden from providing service from that point to other points in other states beyond . . . ." The Conference Report continues: "While it could not sell through tickets . . . between Love Field and points beyond the contiguous states, its usual ticketing, scheduling and ratemaking practices would not be otherwise affected." Since Congress knew that these enumerated practices constituted interlining, it is not

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[10] The DFW Parties and Southwest assert that the Amendment takes precedence over, and need not be harmonized with, IATCA and the earlier Deregulation Act. Even if this is so, it is not reasonable to assume that Congress would have adopted the Amendment with the purpose of granting a carrier (Southwest) a de facto monopoly position at Love Field after having enacted prior legislation with the primary purpose of placing greater reliance on competitive and market forces to protect the public interest.

reasonable to argue that Congress intended to bar air carriers who interline elsewhere on their systems from serving Love Field.

The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states. As a result, subclauses (1) and (2) are not properly read as class and operational restrictions, respectively. Rather, these subclauses simply specify interline and on-line restrictions applicable to service at Love Field.

Moreover, statements of Congressman Anderson of California and Senator Cannon of Nevada also support this interpretation of the Amendment. Each was a member of the Conference Committee, and each was the floor manager of the bill reported out of the Conference Committee. The views of Conference Committee members and floor managers are entitled to greater weight than that usually afforded the views of individual legislators, especially where such expressed views are consistent with other elements of the legislative history. *Train v. Colorado Public Interest Group*, 426 U.S. 1, 14 (1976). The DFW Parties and Southwest rely on the statements of Congressman Wright in support of the House version of the bill, rather than those of Congressman Anderson and Senator Cannon in support of the Committee version; however, Congressman Wright was not a member of the Conference Committee, the bill reported by that Committee was not the House version he had sponsored, and both the House and Senate accepted the compromise provision reported out by the Conference Committee.

On the floor of the House, Congressman Anderson, explaining the Amendment, said: "The prohibition in section 29(c)(1), against an air carrier providing through service or ticketing with another air carrier . . . only applies with respect to a carrier's Love Field service . . . ." 126 Cong. Rec. H. 520 (February 4, 1980). In a colloquy on the Senate floor,

Senator Cannon expressed the same understanding. 126 Cong. Rec. S. 952 (February 5, 1980). The legislative history, taken as a whole, supports our view that the intent of Congress in the Love Field Amendment was to limit interstate service at that airport to short-haul, turnaround flights, not to prohibit carriers offering interline services elsewhere from serving Love Field. The floor debates likewise indicate that operations not touching Love Field were not to be included within the prohibitions of the Amendment.

In sum, the Department believes that the plain wording of the Amendment and the legislative history, including the Conference Report and relevant statements by the Amendment's floor managers, show that our less restrictive interpretation of the Amendment is correct. Thus, we find that Continental may serve Houston from Love Field, although the carrier provides interline services elsewhere on its system. This conclusion is supported by the comments of various parties, including the Justice Department, American West, and Air Midwest. The arguments of the DFW parties and Southwest to the contrary are not persuasive. Further, since we find that Continental may serve Love Field consistent with restrictions of the Amendment, we have determined that it is not necessary to address Continental's additional argument that the amendment may violate the equal protection clause.

Finally, Republic argues that permitting Continental to serve Love Field is unfair in a competitive sense, since our interpretation of the Amendment benefits those carriers who maintain hubs in Texas and the four contiguous states to the exclusion of those who do not. Republic's argument is not convincing. Republic is free to establish its hubs wherever it chooses. There is nothing competitively unfair to Republic in our interpretation of the Love Field Amendment as drafted and intended by Congress.

MARKETING RESTRICTIONS

Continental raised four questions in its comments regarding marketing problems faced by carriers serving Love Field. The statements attached to its comments are a vivid demonstration of the confusion present today in Love Field service. Continental first asks: 1) whether a passenger may buy two tickets (so-called "double ticketing") at Love Field, one for service from Love Field to a point within Texas or the four adjacent states, and a separate, second ticket for service from that destination to a beyond point; and 2) whether the second ticket may be for the carrier's most efficient connecting flight. The answer to both questions is yes. To hold otherwise would be unreasonable and beyond that needed to effectuate the Amendment's restrictions. *See*, CAB Order 80-12-102 (December 18, 1980).

The language of the Amendment and is legislative history indicate that Congress had two concerns in restricting service to Love Field. First, Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area. Conference Report at 25. However, Congress did not intend to preclude a carrier from operating flights from a destination point served from Love Field to a point outside the Love Field service area. Id. at 26. Second, Congress intended to prohibit carriers from promoting, offering, or holding out service from Love Field to a point beyond the service area. Subsection (c). Conference Report at 25. Congress used the word "offer" in the Amendment itself; although the legislative history refers to "holding out." In some contexts, the terms "offer" and "hold out" can be used interchangeably. *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956); *Cf. Grajewski v. Commissioner*, 723 F2d 1062, (2d Cir. 1983).

"Through service" and ticketing specifically refer to the provision of transportation between an ultimate origin and destination on a single ticket for a single sum fare. *Cf. Tariff*

Flexibility Rulemaking ER-1246, Order 81-81-58 (November 10, 1981). *See also, Visit USA/Export/Inland Contract Rate Investigation (VUSA Investigation)*, Order 84-8-55 at 26 (August 10, 1984). The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights. The key concept is that it is sold by the carrier, and perceived by the passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract.[11] Through service provides certain conveniences for the passengers. For example, the passenger need not reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.

In contrast, double ticketing involves the use of two tickets (hence, two contracts of carriage), the payment of two separate fares, and requires the passenger to forego the service conveniences associated with through ticketing. Although Congress prohibited through service and fares at Love Field, it intended that a carrier's "usual ticketing, scheduling and ratemaking practices would not be otherwise affected." Conference Report at 26. Such "other" practices may include double ticketing. *Cf. Interstate and Intrastate Fares in California Markets*, 71 CAB 23 (1976).

The language of the Amendment makes clear that a carrier cannot advertise, promote, or otherwise affirmatively solicit double-ticketing passengers. The question, then, is whether the sale of double-ticketed service at the unsolicited request of a customer amounts to an offer or holding out. Such a sale is not necessarily an offer. An offer is a proposal to sell a

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[11] In the case of connecting flight service, the amount of the fare may be calculated by simply adding the local fares on individual flight segments, or it may be a different, usually lower, fare reflecting costs or competitive considerations. The key concept, again, is that the fare is stated as a single amount. *Cf. VUSA Investigation*, Order 84-8-55 at 27.

ticket or provide transportation. *Frissell v. Nichols,* 94 Fla. 403, 114 So. 431,433 (1927); *Cf. Daitom, Inc. v. Pennwalt Corporation* 741 F2d 1569 (10th Cir. 1984). If a carrier simply responds to a customer's unsolicited request, it has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer, although the carrier's acceptance results in a contract. Congress prohibited carriers from "offering for sale ... transportation to or from ... any point which is outside [the Love Field Service area]"; but neither the wording nor the legislative history prohibits carriers from selling, or passengers from purchasing, transportation to points outside the Love Field service area. While the Amendment prohibits single-plane flights, interline service, through service and ticketing, and advertising and promotion of service outside the Love Field service area, it does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service. Thus, to prohibit double ticketing or the sale of a carrier's most convenient flight from a destination in the Love Field authorized service area to a beyond point exceeds what is necessary to prohibit through service and ticketing from Love Field.

Continental's second question, also asked by Delta, is whether a carrier may display in a computer reservations system under "connections" service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question. It says that "carriers may not hold out, offer or advertise Love Field service to or from points beyond the four contiguous states in any respect, including the publication of connecting flight schedules in airline guides, flight schedules, or similar media." Conference Report at 25. The ban on advertising of service from Love Field beyond Texas and the four contiguous states is clearly envisioned by the Amendment.

The phrase "airline guides, flight schedules, or similar media" includes computer reservations systems. These systems were used at the time of the Amendment's passage and not specifically excluded.

Continental's third, related marketing question is whether a carrier may advertise connecting service and display connecting service, as such, in its flight schedules. Again, the answer is no. Unsolicited information furnished to the public in any form is a means of offering or holding out, which is prohibited. *See, e.g., Red Ball Transit Co. v. Marshall* 8 F2d 321,323 (S.D. Ohio 1925). Moreover, as discussed above, Congress clearly contemplated prohibiting publication of such flights in individual carrier schedules, as well as industry information media.

Continental's fourth question concerns the marketing of fares and their construction. Continental asks whether a fare could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field to a point in the authorized area, plus that point to a point outside the service fare.) This practice would clearly involve the offer of a through fare, since it could not be considered as anything but a single sum fare. Moreover, it could not be offered as anything but a single contract of carriage, *i.e.,* a single through ticket. This is different from the double-ticketing situation, discussed above, which involves two separate contracts of carriage. The Conference Committee Report states that "... a carrier could not ... offer through fares between Love Field and points beyond the contiguous States ..." Conference Report at 26. Therefore, a carrier cannot offer a constructed fare for double-ticketed service originating or terminating at Love Field.

Throughout this discussion on marketing, we have used the term "carrier" to include travel agents or other persons or methods used by the carrier to sell its tickets and services.

Whenever an agent is acting for a principal, the same restrictions applied to the principal apply to the agent.

SMALL AIRCRAFT OPERATIONS

In connection with its computer reservations system, Delta asks whether a certificated carrier using small aircraft should be treated the same as a commuter carrier serving Love Field. The Amendment specifically authorizes interstate air transportation at Love by commuter airlines using aircraft of 56 seats or less. The term "commuter airline" is not defined elsewhere in the Amendment. The Amendment's language must, therefore, stand on its own. Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative.[12] Thus, we find that operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations.

INTRASTATE OPERATIONS

We also asked for comments on whether the Amendment applies to intrastate service within Texas. The Amendment is somewhat ambiguous on this question. Subsections (a) and (b), by their terms, apply only to flights form love Field to "points outside the State of Texas." Subsection (c), however states that subsections (a) and (b) do not apply to, and under certain conditions carriers may provide, fights between Love Field and "points within the State(s) of . . . Texas." The Conference Report states that the "provisions do not affect . . . intrastate service in Texas." Conference Report at 25. Thus, we conclude that the Amendment does not apply to

[12] The Department has taken this approach to all aspects of economic regulation of commuter air carriers. 14 C.F.R. 298.90.

service by an intrastate carrier or to service carrying only intrastate passengers by an air carrier.

The more difficult issue, however, is the application of the Amendment to air carriers providing both intrastate and interstate service on the same flight. The CAB faced this question in Order 80-8-181. It decided that carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area. The Department believes the CAB was substantially correct. In our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate service from Love Field on the same flight without violating the Amendment's restrictions. However, the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

ACCORDINGLY,

1. Continental or its agents may provide service from Love Field, Dallas, Texas, to Houston, Texas;

2. Continental or its agents may sell a ticket form an authorized destination of a flight from Love Field to a point beyond that destination, if demanded by a passenger, separately from the ticket for the Love Field flight, provided the amount of the tickets equals the sum of local fares;

3. Continental or its agents may not by any means whatsoever list or advertise "connecting" flights for an authorized Love Field flight to a point beyond the Love Field service area, including listings in a computer reservation system;

4. Delta may list in its computer reservation system service by certificated air carriers that use aircraft of 56 seats or less

serving Love Field in a manner similar to listings for commuter air carriers; and

5. The Amendment does not apply to service by intrastate carriers or intrastate service by an air carrier certificated under the Act.

By:

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Assistant Secretary for Policy
and International Affairs

(SEAL)

MOTION FILED
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Nos. 99-1739 and 99-1745

IN THE

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Petitioner,

- and -

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Airports Council International – North America ("ACI-NA") hereby moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file a brief as amicus curiae in support of the petitions ("Petitions") for writ of certiorari, Nos. 99-1739 and 99-1745, to the United States Court of Appeals for the Fifth Circuit.

ACI-NA's members are the state, local and regional governing entities that own and operate commercial service airports in the United States and Canada. ACI-NA member airports serve more than 97 percent of the U.S. domestic scheduled air passenger and cargo traffic, and virtually all U.S. scheduled international air travel. Those members are directly impacted by the issues raised in the Petitions pertaining to the scope of federal preemption of the proprietary powers of airport owners and operators and thus ACI-NA is uniquely positioned to address those impacts and to aid the Court in considering the Petitions.

ACI-NA supports the Petitions, which seek review of a Fifth Circuit decision ("Decision") entered February 1, 2000, entitled *Dallas-Fort Worth International Airport et al. v. Department of Transportation* and reported at 202 F.3d 788 (5th Cir. 2000). That Decision wrongly concluded that the Airline Deregulation Act, currently codified at 49 U.S.C. § 41710 *et seq.* ("Deregulation Act"), preempted a contract, called a "use agreement," between the Dallas-Fort Worth International Airport Board, which owns and operates DFW International Airport, and a commercial airline, American Airlines, which provides service at DFW International Airport. The use agreement sets forth agreed-upon terms and conditions — including the space the airline was allowed to occupy exclusively and the rent charged for that space — under which the airline was entitled to use the airport's

facilities. The Fifth Circuit mistakenly concluded that a provision in the use agreement, by which American Airlines agreed to base certain interstate flights at DFW International Airport and not at nearby Love Field, was preempted since it had the effect of a local rule or regulation relating to "routes or services" which the Fifth Circuit decided was preempted by the Deregulation Act.

The Fifth Circuit's Decision contradicts earlier court decisions recognizing the validity of local political entities exercising, as airport owners and operators, proprietary powers to allocate efficiently the use of airport facilities, even where the exercise of such power impacts "routes or services." The Decision also contradicts this Court's reasoning in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). In *Wolens*, this Court concluded that an airline contract, freely entered into by the airline, which impacted "routes or services," was not preempted by the Deregulation Act.

ACI-NA believes the Decision merits review by the Court because the Decision would potentially harm most of the nation's commercial service airports, threatening the ability of airports to exercise their proprietary powers and to rely upon existing use agreements with airlines. It is through such contracts that airport proprietors efficiently allocate the use of their facilities among airlines. Moreover, the commitments set forth in such contracts aid airport proprietors in financing improvements of their facilities. Given the obvious importance of use agreements to the nation's airports, ACI-NA believes it can assist the Court in addressing the question of federal preemption of such use agreements.

It is respectfully requested, therefore, that the Court grant leave to ACI-NA to file the attached amicus curiae brief in support of the Petitions.

Respectfully submitted,

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QUESTION PRESENTED

Did the Fifth Circuit wrongly decide that the DFW International Airport's use agreement with American Airlines was preempted by the Airline Deregulation Act ("Deregulation Act"), currently codified at 49 U.S.C. §§ 41710 *et seq.*

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INTEREST OF THE *AMICUS CURIAE*

Airports Council International – North America's ("ACI-NA") members are the state, local and regional governing entities that own and operate commercial service airports in the United States and Canada.[1] ACI-NA member airports serve more than 97 percent of the U.S. domestic scheduled air passenger and cargo traffic, and essentially all U.S. scheduled international air travel. On February 1, 2000, the United States Court of Appeals for the Fifth Circuit issued a decision ("Decision"), reported as *Dallas-Forth Worth International Airport, et al. v. Department of Transportation*, 202 F.3d 788 (5th Cir., Feb. 1, 2000), which threatens to undermine the ability of airport proprietors to rely on use agreements between airport proprietors and signatory airlines. Use agreements govern the terms and conditions of the signatory airlines' use of airport facilities and are a key mechanism by which an airport proprietor allocates the limited resources of the nation's airports. Given the threat posed by the Decision to the legitimate proprietary use of such agreements, ACI-NA is well positioned to provide the Court with the perspective of the nation's airport proprietors,

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1. Pursuant to Supreme Court Rule 37.6, ACI-NA states that no counsel for any party authored these papers in whole or in part and that no person or entity, other than ACI-NA, its members and its counsel, contributed monetarily to the preparation and submission of these papers.

ACI-NA has requested, pursuant to Supreme Court Rule 37.2, the consent of all parties to ACI-NA's request to file an amicus curiae brief. As of the date of this filing, the United States Department of Justice, the City of Fort Worth, the City of San Francisco, the Dallas-Fort Worth International Airport Board, Legend Airlines, Southwest Airlines and American Airlines have granted such consent.

aiding the Court by explaining both the role of those use agreements at the nation's airports and the potential impact of undermining those agreements.

SUMMARY OF ACI-NA'S POSITION

Petitions Nos. 99-1739 and 99-1745 should be granted because the United States Court of Appeals for the Fifth Circuit decided an important question of federal law in a way that conflicts with a relevant decision of this Court. *See* Rule 10 of the Supreme Court of the United States. Specifically, the Fifth Circuit's Decision conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). In *Wolens*, the Court concluded that a contract between American Airlines and passengers which related to "routes and services" was not preempted by the Deregulation Act, since the terms of the contract were the result of free bargaining. The Fifth Circuit decision eviscerates *Wolens* by concluding that the Deregulation Act does preempt a contract between American Airlines and the Dallas-Fort Worth International Airport Board pursuant to which American Airlines agreed to offer certain interstate service at DFW International Airport and not at nearby Love Field.[2]

The potential harm from the Decision is substantial. The Decision threatens to undercut airport proprietors' abilities to exercise their proprietary power to operate their airports effectively and efficiently. It is pursuant to such proprietary power that almost every airport in the nation has in place "use agreements" which set forth the terms and conditions of the service provided by signatory airlines using the

2. This provision has been included in DFW International Airport's use agreements since the airport opened.

airport's facilities. Historically, Congress has recognized the need for such power to reside with airport proprietors. Indeed, in the Deregulation Act itself, Congress expressly declared that the Deregulation Act was not intended to preempt a state or local government's exercise of its powers as an airport owner and operator. Despite that clear statement of Congressional intent, the Fifth Circuit has now called into question, by misinterpreting the Deregulation Act in contravention of this Court's decision in *Wolens* and earlier case law, the continued ability of airport proprietors to allocate, through contract, airport facilities among potential users and rely upon the commitments in such contracts.[3]

ARGUMENT

In balancing the interests of the federal government in regulating the nation's air transport system against the rights of the owners and operators of the nation's airports, Congress has repeatedly recognized that airport proprietors have the continuing authority to manage the facilities they make available for air transportation. Thus, the Deregulation Act declares, in pertinent part, that:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a

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3. ACI-NA notes that it is concerned here with the Fifth Circuit's interpretation of the scope of the Deregulation Act as applied to use agreements, and not to the *Shelby* or *Wright* amendments impact on air carrier service at Love Field, discussed at length in the pending petitions for writ of certiorari.

> price, route, or service of an air carrier. . . . 49 U.S.C. § 41713(b).

However, the Deregulation Act then immediately qualifies that ban by stating that the preemption provision "does not limit a state [or] political subdivision . . . that owns or operates an airport served by an air carrier . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3).

Here, the Fifth Circuit essentially ignored the limiting provision set forth in Section 41713(b)(3), concluding that the Dallas-Fort Worth International Airport Board's use agreement with American Airlines was preempted because it had the force or effect of an invalid local regulation relating to "routes and services" in violation of the Deregulation Act. In particular, the Fifth Circuit found invalid the following provision of the use agreement:

> Airline agrees that it shall conduct its certificated air carrier services serving the Dallas/Fort Worth area to, from and at the Airport, to the extend required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.

This provision essentially required American Airlines, in exchange for benefits contained in the use agreement, to base its interstate service for the Dallas/Fort Worth area at DFW International Airport.[4]

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4. Not all airlines operating at DFW International Airport choose to avail themselves of the various benefits and obligations of being a signatory to a use agreement. Thus, at least one such airline has historically chosen not to contract away its ability to (Cont'd)

The provision clearly has a reasonable and rational basis: it assured the viability and maximum utilization of DFW International Airport, and it provided for the efficient distribution of Dallas/Forth Worth area flights between the new DFW International Airport and the smaller Love Field. Yet, instead of deferring to the airport owner's exercise of its proprietary power to enter into such use agreements, the Fifth Circuit concluded that a contractual limit on American Airlines' ability to base interstate flights at Love Field constituted an invalid local regulation relating to "routes and services" in violation of the Deregulation Act. That conclusion squarely contradicts this Court's decision in *Wolens*. In *Wolens*, the Court concluded that a contract freely entered into by an airline, even through it related to "price, route or services," was not federally preempted by the Deregulation Act because the contract was a "privately ordered obligation[ ]" which "did not amount to a state's enactment or enforcement [of] any law." *Wolens*, 513 U.S. at pp. 228-229.

The Fifth Circuit attempted to distinguish *Wolens* in two ways. First, the Court noted that the contracting parties in *Wolens* were private parties, while the Dallas-Fort Worth International Airport Board is a public entity. Second, the Fifth Circuit argued that this Court, in *Wolens*, based its decision on the fact that "market efficiency requires effective means to enforce private agreements" while the use agreement at DFW International Airport did not serve the purpose of market efficiency since it "seems" to have been entered into "to implement an agreement between the cities

(Cont'd)
operate interstate flights both from DFW International Airport and nearby Love Field. Correspondingly, that airline does not enjoy the benefits of being a signatory airline at DFW International Airport.

to regulate airport use in the Dallas-Fort Worth area." *Dallas-Fort Worth*, 202 F.3d at p. 811.

Neither argument is compelling. The fact that the Dallas-Fort Worth International Airport Board is a public entity does not lessen the validity of its contracts under the Deregulation Act. If anything, the Deregulation Act's specific reservation of proprietary powers to a state or local entity which owns and operates an airport is an express declaration that federal law is not intended to preempt a local public entity, such as the Dallas-Fort Worth International Airport Board, which owns and operates the airport, from entering into contracts pertaining to the use of its facilities. This is especially true where the purpose underlying the contractual provision, enhancing the financial viability of the airport, is clearly a legitimate goal of the airport proprietor. The Fifth Circuit's "market efficiency" analysis is even less compelling. In *Wolens*, this Court explained:

> The stability and efficiency of the market depend fundamentally on the enforcement of agreements, freely made, based on needs perceived by the contracting parties at the time.

Wolens, 513 U.S. at p. 824. It is that very stability and efficiency which is at issue here. Not every airline which uses DFW International Airport, or indeed any airport, is necessarily a signatory to a use agreement. By signing a use agreement an airline obtains certain benefits and certain obligations it would otherwise not possess. In return, an airport proprietor incurs certain obligations and benefits. One such benefit to an airport proprietor has historically been the ability to rely on the terms of its use agreements when the airport seeks financing for airport improvement projects.

Undercutting the enforcement of such contracts, as surely the Fifth Circuit has done, undercuts the airport proprietor's ability to rely on the terms of its use agreements and maximize the benefits conferred by those agreements.

In attempting to avoid *Wolens*, the Fifth Circuit's decision also contravened the earlier federal decisions addressing the interplay between federal law and airport proprietor rights. In particular, the Second Circuit has held that, consistent with the Deregulation Act, an airport proprietor could choose which airport uses should be accommodated by which facilities within the control of the proprietor. *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 960 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (1987); *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

In *Western Air Lines*, the district court held (and the Court of Appeals agreed) that the Deregulation Act evidenced no congressional intent to bar generally an airport proprietor from decisions as to which of a number of airports within a single market would be available to which user groups. *Western Air Lines*, 658 F. Supp. at 957-958; 817 F.2d at p. 226. Only in the case of a regulation that has no rational basis, unfairly discriminates, or seeks to accomplish an illicit objective would the regulation be preempted. *Western Air Lines*, 658 F. Supp. at p. 958. The district court deemed it significant that the rule at issue was intended "to divert air traffic from one airport to another within the respective system . . . and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter." *Western Air Lines*, 658 F. Supp. at p. 958. In affirming, the Court of Appeals relied on the district court's conclusion that:

> A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager . . . and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest.

Western Air Lines, 817 F.2d at p. 226, citing 658 F. Supp. at p. 957.

In examining exercises of local authority based on traditional judgments about how facilities should be used, and which users should be provided access to particular facilities, the applicable test to be applied affords to the airport proprietor substantial discretion. As stated by *Western Air Lines*:

> A "decision" by the legislature should be upheld unless [the court] can say that it is wide of any reasonable mark.

Western Airlines, 658 F. Supp. at p. 960 (quoting Justice Holmes' dissent in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928)). The Fifth Circuit's decision here accorded no such deference to the airport proprietor's judgment as to the appropriate allocation of services and resulting airport facilities in the Dallas/Forth Worth area. It was the allocation of just such resources which the *Western Air Lines* court recognized as a valid core interest of an airport proprietor. *Western Air Lines*, 658 F. Supp. at 952.

CONCLUSION

Based on the foregoing, ACI-NA requests that the Petitions be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES
DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Airline Deregulation Act's preservation of the "proprietary powers and rights" of local governments owning airports permits local government authorities in the same metropolitan area to regionally plan among themselves for a modern, regional airport that accommodates all types of commercial passenger traffic into the metropolitan area and then to limit further smaller airports to general aviation reliever air service?

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INTEREST OF *AMICUS CURIAE*

The Arapahoe County Public Airport Authority ("ACPAA")[1] owns and operates Centennial Airport ("Centennial") which is the second busiest general aviation reliever airport in the United States. As part of its creation as a county airport[2] in 1966 the Arapahoe County Commissioners publicly promised the county taxpayers that Centennial[3] would serve as a general aviation reliever airport for Stapleton International Airport[4] ("Stapleton International") and Centennial would never serve scheduled passenger service. Consistent with regional and national planning, as well as its design and construction, Centennial has served for 33 years as a general aviation reliever airport.

Centennial's role as a general aviation reliever airport was affirmed by the Colorado Supreme Court in *Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P. 2d 587 (Colo. 1998). Rejecting an air

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[1] Counsel for a party did not author this brief, in whole or in part. The monetary contribution for the preparation and submission of this brief is paid by the Board of Commissioners of Arapahoe County, Colorado. Three Arapahoe County Commissioners sit on the five member ACPAA Board of Commissioners.

[2] ACPAA became a political subdivision of the state of Colorado in 1975 and assumed ownership and operation of Centennial.

[3] Centennial was originally known as the Arapahoe County Airport.

[4] Stapleton International was closed in 1995 and replaced by Denver International Airport ("DIA").

carrier's challenge to ACPAA's ban on scheduled passenger service, the Colorado Supreme Court held that the ban falls squarely within the proprietary powers exception, 49 U.S.C. §41713(b)(3). *Id.* at 595-96.

Approximately four (4) months after the Colorado Supreme Court decision, and more than five (5) years after ACPAA had contacted the United States Department of Transportation ("DOT") about its position on scheduled passenger service, the Federal Aviation Administration ("FAA") ruled on three administrative complaints that had been filed against ACPAA, which complaints were pending at the time of the Colorado Supreme Court's decision[5]. The FAA declared that ACPAA did not have the proprietary power to ban scheduled service and, consequently, stripped ACPAA of its eligibility for discretionary federal grant agreements.[6]

The decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), which is at issue here, declined to follow and distinguished the Colorado

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[5] Two of the complaints had been filed by the air carrier. The first one had been filed in January 1995, following the state trial court's granting of the Permanent Injunction Order. The second one was filed in February 1998, following oral argument before the Colorado Supreme Court. Finally, a complaint had been filed by a shareholder of the air carrier in August 1994.

[6] The Final Agency Decision and Order was ultimately entered on February 18, 1999. It is the subject of a Petition for Review filed by ACPAA now pending before the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). See *Arapahoe County Public Airport Auth. v. Federal Aviation Administration, et al.*, No. 99-9508. Oral Argument was held on March 6, 2000.

Supreme Court decision. The Petition for a Writ of Certiorari ("Petition") states: "The single important issue presented . . . is whether the Airline Deregulation Act (the 'ADA') preempts the authority of local governments to implement regional plans that allocate particular types of air traffic to specific airports." *Id.* at 3. The resolution of this issue in favor of ACPAA was one of the major bases for the Colorado Supreme Court decision upholding the ban on scheduled passenger service at Centennial. See *Arapahoe County Public Airport Auth.*, 956 P. 2d at 589-91, 594, 596-97. Because of the history of Centennial's planning and design, ACPAA wishes to address this proprietary power issue. It is an issue which ACPAA submits is absolutely crucial, not only to Centennial and Dallas-Fort Worth International Airport, but also to the national aviation system.

REASONS FOR GRANTING THE PETITION

This Court has never addressed "what limits, if any, apply to a municipality as a proprietor." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n. 14 (1973). As noted by the Colorado Supreme Court, the lower federal courts have addressed the proprietary powers exception in two general areas – noise and perimeter rules. See *Arapahoe County Public Airport Auth.*, 956 P. 2d at 595. Consistent with the decision in *Western Air Lines, Inc. v. Port Auth. of New York & New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F. 2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), the Colorado Supreme Court upheld the ban on scheduled passenger service as a valid exercise of ACPAA's proprietary

powers. *Arapahoe County Public Airport Auth.*, 956 P. 2d at 594-96. As asserted by Petitioner, the Fifth Circuit decision directly conflicts with the *Western Air Lines, Inc.* and *Arapahoe County Public Airport Auth.* decisions. Granting the Petition would provide this Court with the opportunity for its first interpretation of 49 U.S.C. §41713(b)(3). Granting the Petition would also provide guidance and direction, not only to all state and federal lower courts, but also to the DOT and FAA which, as noted by Petitioner, are acting inconsistently on the issues of proprietary powers and regional planning. See Petition at 16-17.

I. The History of Centennial's Planning and Design Supports the Granting of the Petition.

In declining to follow *Arapahoe County Public Airport Auth.*, the Fifth Circuit states:

> To the extent that *Arapahoe* holds that it is within an airport owner's proprietary powers to restrict service at a local airport without articulating a viable purpose for the restriction, we view that case as deviating from the generally accepted rule that we adopt here. In *Arapahoe*, the Colorado Supreme Court – without finding any purpose for the restriction beyond the proprietor's bald assertion that it would 'strip' the airport Authority 'of its ability and authority to manage the Airport', see *id.* at 591 – upheld a municipal proprietor's ban on all passenger service at Centennial Airport, see *id.* at 595.

American Airlines, Inc. v. Department of Transportation, 202 F. 3d 788, 807 (5th Cir. 2000).

ACPAA submits that the Colorado Supreme Court did articulate several viable purposes for the ban, one of which is at issue here – regional planning. A review of the facts before the Colorado Supreme Court demonstrate the relevance and importance of regional planning.

Centennial first opened in 1967. At the time, Stapleton International was experiencing problems with general aviation congestion and Centennial was built for the express purpose of relieving Stapleton International from general aviation activities so that Stapleton International could function as the scheduled passenger airport for the Denver metropolitan area.

Controversy surrounded the creation of Centennial. The Arapahoe County Commissioners promised the public that Centennial would be general aviation only, and would not permit scheduled passenger service. In 1975 the County Commissioners created ACPAA which is a political subdivision of the State of Colorado. The Commissioners, whether County or ACPAA, have never knowingly permitted scheduled passenger service at Centennial.

On May 7, 1993 Centennial Express Airlines, Inc. ("CEA") filed an Application to Conduct Scheduled Passenger Service at Centennial. The Application proposed to operate 30-seat aircraft directly to eight cities, six scheduled flights per day. This proposed operation, at a sixty (60%) percent load factor, would result in approximately 630,000 passengers a year at Centennial.[7]

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[7] Subsequent to the Colorado Supreme Court ruling and during the FAA hearings held on November 12, 1998, CEA

On July 21, 1993, ACPAA and Arapahoe County wrote to DOT ("1993 letter"). The 1993 letter with supporting materials, addressed why Centennial, a general aviation reliever airport, should not be required to accept or approve applications for scheduled passenger service. The 1993 letter sets forth the history of Centennial's planning as a general aviation reliever airport.

1. By letter dated February 1, 1963, the Public Utilities Commission of the State of Colorado set forth certain facts and opinions in support of the establishment of a new airport to be located southeast of Denver to serve general aviation and to relieve congestion being experienced at Stapleton International. The letter specifically stated: "The suggested general aviation airport would serve all types of civil aircraft, other than scheduled air carriers. . . . "

2. On February 16, 1965, by Resolution, it was recited that Arapahoe County had accepted an offer from the United States government to fund preparation of planning documents for a general aviation airport.

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acknowledged that the May 1993 application would have resulted in 96 scheduled passenger flights a day into and out of Centennial or 2,880 passengers daily, and in one calendar year 1,051,200 passengers. With a 60% load factor there would be 630,000 passengers per year. Further, CEA had discussed a proposal with the FAA to link 10 similar operations together at Centennial and claimed that FAA approved this concept. ACPAA notes that this concept could have resulted in a potential 6.3 million passengers a year out of an airport that has no on-the-airport fire and rescue, no terminal, no baggage system, no adequate parking, and no adequate security.

3. On February 8, 1966 the Arapahoe County Planning Commission adopted a Resolution in support of the construction of a general aviation airport.

4. On March 14, 1966 the crowded conditions at Stapleton International were reported in a newspaper article. On March 30, 1966 a public meeting was held concerning the proposed construction of the Arapahoe County Airport. Newspaper coverage of this event reported that the Arapahoe County Planning Director stated that the airport would serve general aviation and not scheduled carriers, and a representative from the FAA, in the audience at this meeting, was purported to say that the new airport should relieve congestion at Stapleton International.

5. In 1966, by Resolution, the Chairman of the Board of Arapahoe County was authorized to sign a Request for Aid – Federal Aid Airport Program, for the fiscal year beginning July 1, 1966.

6. On May 13, 1966 a local newspaper carried the response of the Chairman of the Board to a homeowner's association opposing the proposed airport, that a further justification for the airport was to act as a general aviation reliever airport for a crowded Stapleton International.

7. Dedication ceremonies for the Arapahoe County Airport were held on May 12, 1968. It was reported in the newspaper that the FAA area director was delighted that the new airport had been built and FAA regards Arapahoe County Airport as "a much-needed reliever terminal for general aviation".

8. On October 21, 1981, ACPAA approved an Environmental Assessment and Airport Master Plan Study ("Master Plan") for the airport. Presentations of the Master Plan were made to local governmental entities and other organizations. In addition, a public hearing was held. The Master Plan was approved by the FAA by letter dated October 28, 1981, in which letter it was stated that the Master Plan complies with "the conditions of the grant agreement" and that the Master Plan "should be furnished to all local governmental agencies having an interest in airport development".

The Master Plan described the Arapahoe County Airport as a designated general aviation reliever for Stapleton International and "in the National Airport System Plan as a General Aviation (G/A) reliever with a Basic Transport functional role" and that no "scheduled air carrier or commuter airlines serve the airport although air taxi and charter service is available through fixed based operators". In reference to Stapleton International, the Master Plan stated that it was "the only air carrier airport in the Denver Metropolitan Region . . . " The Master Plan stated that the National Airport System Plan envisions no change in the airport operational role over the 20 year period of the Master Plan. It also stated that the "airport is expected to remain the primary general aviation reliever in the Denver Metropolitan Region during the next 20 years . . . "

The Environmental Assessment was approved by FAA on June 17, 1982. In the Environmental Assessment, the Arapahoe County Airport was described as a general aviation airport and a reliever airport for Stapleton International:

> The proposed action will not change the designation or role of Arapahoe County Airport within the National, Regional, State, or Local Airport system. The airport will remain a Basic Transport airport, serving general aviation with a role as a reliever for Stapleton International.

The Master Plan also contained the Airport Layout Plan. The Layout Plan showed future construction of two new east-west runways. In order to build these runways, additional land had to be acquired. In 1982 and in 1983 grants were issued by the FAA for land acquisition for these proposed east-west runways. By letter dated June 26, 1986 the FAA solicited support from ACPAA to surrender these grants, and in the letter it was stated:

> Should you decide to abandon plans for the runway, it will be necessary that you rethink the future role of the airport. For example, if capacity is constrained, it may be desirable (as was done at Stapleton) to discourage use of the airport by certain types of operations. There would also be need to rethink optimum use of existing airport lands and to perhaps dispose of lands no longer needed for airport purposes. These similar matters could be the focus of a revised Airport Master Plan Update.

On February 9, 1987 ACPAA and Arapahoe County entered into a cancellation Agreement. By Resolution, ACPAA approved a revised Airport Layout Plan which eliminated the two proposed east-west runways and proposed the extension of the existing east-west runway. In April 1992, ACPAA approved a second revised Airport Layout Plan which reduced the proposed extension of the existing east-west runway.

9. The 1993 letter also addressed regional planning through the Denver Regional Council of Governments ("DRCOG"). DRCOG is a voluntary association of 44 county and municipal governments that work together on regional planning issues. DRCOG develops and maintains a regional aviation system plan "to ensure that overall general aviation planning is integrated with comprehensive regional and local goals, policies and planning."

In 1989 DRCOG published the *2010 Regional Aviation System Plan* ("2010 Plan"). The preparation of the 2010 Plan was financed in part through a continuing aviation system grant from the FAA. The 2010 Plan designated Centennial "as a non-commercial passenger, transport-category, general aviation reliever airport". The 2010 Plan discussed the capacity constraints at Stapleton International and the necessity for a new air carrier airport to be in operation by the mid-1990's in order to meet future projections.

In December 1991, DRCOG published the *Regional Aviation System Planning Program Data File*. The preparation of this document was financed in part through a continuing aviation system planning grant from the FAA. In this document Centennial "is categorized as a non-commercial passenger, transport category, G.A. reliever". The document also stated: "Stapleton International Airport is the only airport in the region serving certified airlines and providing short and long-haul scheduled passenger and cargo service."

10. The *FAA Aviation Forecasts* published October 1990 by the Forecast Branch, Office of Aviation Policy and

Plans of the FAA, contains forecasts of aviation activity in the Denver-Boulder "Hub". In this publication, Centennial is described as a reliever airport for Stapleton International and reliever airports are defined as: "metropolitan area general aviation airports which serve to reduce air carrier airport congestion by providing facilities and service suitable for attracting and diverting general aviation activity away from major air carrier airports." The publication describes Stapleton International as the designated air carrier airport in the Denver region. It is also stated in this document that:

> The Denver Stapleton airport facility is scheduled to close in late 1993 in conjunction with the opening of the new Denver International Airport ('DVX') in Adams County. It is expected that most of the GA activity and based aircraft now operating at DEN will move to the Front Range, Centennial, or Jefferson County airports. It is expected that the new airport will have only limited facilities available for the handling of GA aircraft (i.e., no Fixed Base Operator) and that GA activity destined for DVX will be encouraged to utilize the facilities of other reliever airports in the Denver CMSA.

11. On March 4, 1991, the Secretary of Transportation submitted to the United States Senate and the House of Representatives the National Plan of Integrated Airport Systems ("NPIAS") 1990 – 1999, as required by § 504(a) of the Airport and Airway Improvement Act of 1982. The NPIAS sets forth state summaries and individual airport data. Under primary and commercial service systems for Colorado, Denver new and Denver Stapleton

International are listed with their reliever airports, Centennial, Jeffco, Front Range, and new. Under reliever and general aviation system for Colorado, Centennial is listed for the years 1990-1994, and for the years 1995-1999 as a Reliever Airport, Transport Type.

ACPAA did not receive a response to its 1993 letter for seventeen months.

In the interim, on April 8, 1994, CEA filed with ACPAA an amended application. This application sets forth a proposed operation for 30-seat aircraft to five major cities with seventeen departures per day.

On August 7, 1994, a shareholder of CEA filed a complaint with the FAA against ACPAA. The shareholder complained about ACPAA actions dating from 1985, which actions denied access to scheduled passenger service, and also that such actions violated ACPAA's grant agreements with the FAA.

On September 8, 1994, ACPAA adopted, revised and restated Minimum Standards for Commercial Aeronautical Activities ("Minimum Standards").[8] These Minimum Standards define Centennial's "Airport Purpose" as:

> any Authority action, undertaking or development that is consistent in maintaining the non-certificated status of the Airport and in preserving the Airport funding category as a 'Reliever Airport' serving general aviation users. Under no circumstances shall the Airport Purpose include scheduled passenger services.

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[8] ACPAA first adopted Minimum Standards on February 5, 1981.

On December 20, 1994, CEA, in violation of the Minimum Standards, initiated scheduled passenger service between Centennial and Dalhart, Texas. ACPAA filed suit against the airline and obtained a Temporary Restraining Order on December 22, 1994.

On December 23, 1994, ACPAA finally received a letter from the DOT in response to the 1993 letter ("DOT letter"). The DOT letter noted the filing of the shareholder's complaint in August 1994 and the understanding that the FAA was docketing the complaint. The DOT letter noted that CEA had commenced scheduled passenger service over ACPAA's objections. The DOT letter also noted: "In addressing similar cases in the past, FAA has found it arbitrary to exclude any particular class of service due to factors that are not reasonably related to the impacts of that service." The DOT letter then addressed the 1993 letter, the materials submitted, and ACPAA's obligations under its grant agreements. The DOT letter continued by stating:

> Although the material that you submitted states that approval of scheduled service would increase the number of operations and passengers at Centennial Airport, there was insufficient information submitted with your letter to demonstrate that a restriction of any particular category of operation could be adequately supported. For example, although individual factors are not alone likely to be dispositive, your letter does not discuss the nature and extent of any resulting environmental impact, congestion, or effect on airport facilities such as the terminal or parking, that would result from the initiation of scheduled service. . . .

Permanent injunction hearings were held on January 3, 5 and 6, 1995. Among the witnesses testifying was Mr. Isbill, the airport engineer responsible for the design, engineering and coordination of the construction of Centennial. Mr. Isbill testified that from the beginning in 1965 or 1966 until the hearing in January 1995, there had not been any design consideration for scheduled air carriers or the impact they may have on the airport or the facilities they may require. The design was for general aviation operations. This witness also testified that if a commercial service airport was designed, there would be several differences in the ground site design. He "would have planned a terminal area and set aside auto parking, auto access lighting, and some type of security." The witness also identified the design concerning baggage and ticketing facilities, and the absence of all of these previously described elements from Centennial.[9] Finally,

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[9] Jim Dunlap, Deputy Director of Aviation/Operations for DIA testified at the November 1998 FAA Hearings. There are 108 daily departures from DIA from four airlines that provide the same type of service that was proposed by CEA at Centennial. For these operations DIA provides concourse parking, jetways (in some cases), security screening for the passengers and the entire realm of support from snow removal and maintenance to ground transportation services and parking. Also, DIA would not allow these 108 daily departures without a passenger terminal, without a baggage system, without a ticketing system, without adequate parking and without security personnel. Further, Mr. Dunlap testified that airport rescue and firefighting is important to the safe operation of the airport because if a piece of equipment isn't at the site within 3 minutes with dry chemical or foam, the chances are that the aircraft is already in flames and it is too late to rescue the passengers.

the witness testified that the present annual capacity of Centennial Airport is 525,000 operations.[10]

Allowing one scheduled passenger operation at Centennial would require ACPAA to allow any other qualified commercial air carrier to commence operations. The Colorado Supreme Court recognized this legal principle and stated:

> Centennial Express has ambitions to become much larger. Opening Centennial's doors to Centennial Express would also require the Authority to make Centennial available to other airlines who wish to provide scheduled passenger service. *See* 49 U.S.C. §47107(a)(4) (1994)

Arapahoe County Public Airport Auth., 956 P. 2d at 596.

James DeLong, the Director of Aviation at DIA, testified at the District Court injunction hearing as follows:

> Hobby was originally the air carrier airport until 1969, when the City of Houston built a new Houston Intercontinental facility. From 1969 until the mid-'70's, it was a pure general aviation reliever airport, and it was always the intent of the community that all air carrier activity occur at the other facility. In the mid-'70's, a small airline by the name of Southwest thought it might be appropriate to try one airplane flying to and from Dallas and Hobby airport. I think they either had one or two flights a day, but don't quote me on that because it predated

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[10] In 1998 total operations at Centennial were 466,267. In 1999 total operations were 436,081. In 2000 projected operations are 474,000.

> me by about three years. No one noticed it initially. I was the airport manager in 1979 at Hobby and responsible for it until about 1987. In 1989, there were about 4 million passengers going through Hobby, because once Southwest got a toehold, every other airline that served Houston had to go into that market simply because the competitive advantage of that airport being so close to the center of the city was such that they had no choice, and I understand in 1993, I think they processed over 9 million passengers through Hobby airport.

On January 10, 1995 ACPAA obtained a Permanent Injunction Order against the Airline. The trial court found that: (1) Centennial is approaching its capacity; (2) current FAA policy would allow a general aviation reliever airport such as Centennial to ban scheduled passenger service if Centennial was in a multi-airport system under one owner; (3) local, regional and national planning has designated Centennial as a general aviation reliever airport in a multi-airport system; and (4) such planning is consistent with and the functional equivalent to the FAA's policy that allows multi-airport proprietors to ban scheduled passenger service at a general aviation reliever airport in order to maintain the attractiveness of the general aviation reliever airport to general aviation.

The Permanent Injunction Order also states that Centennial is not designed to accommodate scheduled passenger service. If scheduled passenger service had been intended, Centennial would have been designed with a terminal, baggage system, adequate security and adequate parking.

On April 9, 1998, four days before the Colorado Supreme Court ruling, and in what ACPAA considers a related matter, ACPAA adopted a Resolution containing an additional basis for the ban on scheduled passenger service. This Resolution arose out of an application for a public charter operation which ACPAA determined to be a scheduled passenger service operation. This additional basis is the National Transportation Safety Board's ("NTSB") recommendation that scheduled passenger service be permitted only at airports certificated pursuant to 14 C.F.R. Part 139. Centennial is not certificated pursuant to 14 C.F.R. Part 139. Centennial does not have on-the-airport fire and rescue capabilities.

On April 13, 1998, the Colorado Supreme Court issued its opinion in *Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P. 2d 587 (Colo. 1998).

On August 21, 1998, notwithstanding the planning, funding and design of Centennial for over 30 years as a general aviation reliever airport, the existence of administrative complaints against ACPAA since 1994, and the FAA's contemporaneous knowledge of the state court litigation from inception to conclusion, the FAA determined that ACPAA could not ban scheduled passenger service. ACPAA was stripped of its eligibility to apply for discretionary federal grant agreements. ACPAA appealed the decision.[11]

At the FAA hearings, ACPAA's Commissioner witness testified that there were no plans by ACPAA to make

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[11] See footnote 6, *supra*.

any design changes to Centennial with respect to a passenger terminal, adequate parking, adequate security or a baggage system. Further, there were no plans by ACPAA to change Centennial's role as designated in DRCOG's regional planning. He also testified that the previous Board denied regularly scheduled passenger service and the current Board continues to do so. There is no ability, either from an infrastructure or financial perspective, to do other than ban regularly scheduled passenger service. With respect to the proposed volume of scheduled passenger service as set forth in CEA's May 1993 application, it would be devastating to the character of Centennial.

CONCLUSION

ACPAA accepts the consequences of maintaining its role as a general aviation reliever airport – there will be no future federal funding. ACPAA, however, agrees with and supports the Petitioner. If use restrictions, around which restrictions an airport is planned, funded and designed, can be invalidated years later, local governments and their populace will be reluctant to support the construction of new airports. When the FAA retroactively ignores its statutory mandate set forth in 49 U.S.C. §40101(8) and 49 U.S.C. §47101(g), to coordinate with local and regional planning, the FAA, and not the local

owner and operator, constitutes the greater obstacle to a continued, viable national aviation system.

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No. 99-1745

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE THE CITY OF GREENWOOD VILLAGE COLORADO IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The City of Greenwood Village is a home-rule city incorporated in 1950 pursuant to the Colorado Constitution, Art. 20, §1, and C.R.S. §31-1-201. Greenwood Village is located in Arapahoe County, Colorado, one of the four counties comprising the metropolitan area of Denver, Colorado. Development in Greenwood Village consists primarily of office park buildings, commercial shopping areas, schools, and residences. Greenwood Village has approximately 12,000 residents but more than 40,000 persons work in Greenwood Village and commute into and out of Greenwood Village each weekday. Many of the city's 12,000 residents live within an area described as the Airport Influence Area encompassing an estimated 25 square miles in both Arapahoe and adjacent Douglas Counties.

Greenwood Village essentially borders Centennial Airport, a general aviation reliever airport, owned by Arapahoe County and operated by the Arapahoe County Public Airport Authority ("ACPAA") in the southeastern area of metropolitan Denver. In 1966, Centennial Airport was originally planned and approved as a general aviation reliever facility to Stapleton Airport, the area's only scheduled passenger service airport. *Arapahoe County Public Airport Authority ("ACPAA") v. Centennial Express Airlines, Inc.*, 956 P.2d 587, 589 (Colo. 1998). For the last 12

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[1] The City of Greenwood Village has secured the consent of all of the parties to this proceeding in the Court of Appeals and the letters of consent are attached to this brief. No party has authored any part of this brief. Greenwood Village has paid for the legal fees and costs associated with the filing of this brief.

years, there has been continued pressure to convert Centennial Airport to a scheduled passenger service facility in direct competition with the Denver area's sole passenger airport, Denver International Airport. *Id.*

Greenwood Village's property tax base depends in large part on the property values which would drop significantly if Centennial Airport were to become a passenger airport with related noise and traffic congestion from passengers and airline workers. Greenwood Village has actively participated in public hearings and litigation to maintain the airport's status as a reliever airport and to protect the city's interests in its zoning and the surface transportation management agreements with Arapahoe County.

Greenwood Village intervened in the FAA enforcement proceeding against the ACPAA, *Centennial Express Airlines, Inc. v. ACPAA*, DOT Docket No. 16-98-05, and in the petition for review now pending before the Tenth Circuit Court of Appeals. *ACPAA v. FAA*, No. 99-9508 (March 10, 1999 10th Cir.). Like this case, the *ACPAA* case concerns whether an airport's proprietary powers allow it to exclude a certain class of operations. Fort Worth sought to limit passenger service at Love Field to protect the regional airport. ACPAA determined that passenger operations and scheduled passenger service were inconsistent with the original purposes of Centennial Airport. *ACPAA v. Centennial Express*, 956 P.2d at 591. In both cases, DOT contends that federal law requires a public airport to accept all classes and types of aviation service and that airports have no power to take into account other factors, like the status of the facilities, regional

transportation decisions, or the impacts on the adjacent communities.

Greenwood Village has a unique perspective and supports the decisions made by these airport proprietors to restrict air service at particular airports. Greenwood Village, also like the communities near Love Field, relied on decisions made by the airport and promises to the residents that these airport would remain limited service facilities. Greenwood Village believes that airport's proprietary rights and powers entitle airport proprietors to make reasonable decisions allocating air service among various regional airports.

STATEMENT OF THE CASE

Greenwood Village adopts the Statement of the Case in the Petition for a Writ of *Certiorari* filed by American Airlines.

SUMMARY OF ARGUMENT

1. While the Airline Deregulation Act ("ADA") preempts state and local government regulation "relating to" aviation rates, routes and services, 49 U.S.C. §41713(b)(1), it also preserves the authority of a local governmental entity operating an airport to exercise its proprietary powers and rights. *Id.* at §41713(b)(3). The case law seeking to define the line between airport and federal regulation demonstrates that there are as many different outcomes as there are airports in the country.

The contradictions create substantial confusion and inconsistency in an important area of commerce affecting thousands of communities.

2. This Court should accept the petition for a writ of *certiorari*, because communities, like the City of Greenwood Village, need to be able to rely on regional transportation decisions in order to fulfill their respective zoning and traffic management functions. If an aviation facility can be compelled to operate contrary to regional transportation plans and decisions, then communities face significant land use and environmental problems, with limited tools to address these problems after the fact. Litigation by communities seeking to limit the adverse impacts of airports demonstrates that this is a national and widespread problem affecting fundamental division of authority and power between a federal agency and duly authorized local government entities.

ARGUMENT

I. SCOPE OF FEDERAL PREEMPTION UNDER THE ADA UNRESOLVED

This case concerns whether the ADA, 49 U.S.C. §41713(b), preempts the authority of local government entities which own and operate airports to exercise their proprietary rights and powers to engage in land use and transportation planning and to allocate aviation services among the region's respective airports. The Court of Appeals for the Fifth Circuit held that the City of Dallas cannot limit scheduled passenger service at Dallas' close-in Love Field Airport even though the limits were

included in the terms of the original agreement between Dallas and Fort Worth to build and manage the Dallas-Fort Worth Airport. *American Airlines, Inc. v. Dept. of Transportation,* 202 F.3d 788 (5th Cir. 2000).

Since enactment of the ADA, the federal and state courts have attempted to address the scope and extent of federal preemption and the correlative scope of the airport and local government authority. Despite the well-established rules of federal preemption, the application of these rules to the aviation laws and management of airports has led to widely disparate decisions. Both federal and state court decisions reflect the confusion and contradiction in applying the ADA and other federal aviation laws.

A. ADA's Provisions

The ADA provides that no state or political subdivision may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. §41713(b)(1). This subsection was enacted in 1978 to "ensure that the states would not undo federal deregulation with regulation of their own." *Manning v. Skywest Airlines,* 949 F. Supp. 767, 768 (C.D. Cal. 1996); *see also Hodges v. Delta Airlines, Inc.,* 4 F.3d 350, 353 (5th Cir. 1993).

The ADA's express preemption provision is qualified by the next subsection called the proprietary powers exception, which states: "This subsection does not limit . . . a political subdivision of a State . . . that owns or operates an airport served by an air carrier holding a

certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." 49 U.S.C. §41713(b)(3).

B. Preemption Principles

Under the Supremacy Clause, U.S. CONST., Art. VI, cl.2, preemption may be either express or implied "and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992). This Court recognizes three classes of preemption: express, conflict and field. *Id.* If Congress declares an area to be governed by federal law, then preemption is express. *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 560 (1979). Conflict preemption occurs when state law conflicts with federal law, and the Supremacy Clause requires that federal law controls. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 220 (1995) (federal law precludes state regulation but permits contractual enforcement). Field preemption arises when the federal regulatory scheme is so pervasive that there is no room for state regulation. *Hillsborough v. Automated Medical Labs.*, 471 U.S. 707, 713 (1985).

This Court has held that when Congress uses specific language of preemption, as it has done in the ADA, the doctrine of implied preemption may not apply. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 n. 13 (10th Cir. 1993) (applying *Cipollone* analysis to find no implied preemption in tort action concerning adequacy of rear shoulder

harness). Certainly, the ADA carves out express preemption as to rates, routes, and services, §41713(b)(1), while simultaneously reserving the proprietary rights and powers to the airport operator, §41713(b)(3). Thus, the holding in *Cipollone* suggests that any preemption must be limited that which relates to rates, routes, and services and a finding of preemption must be weighed against the reasonable exercise of proprietary powers.

II. REGULATORY ACTIVITIES PREEMPTED BY §41713(b)(1)

The Fifth Circuit construed §41713(b)(3) as being limited to the exercise of power to reduce noise, congestion, or pollution, when the statute itself does not contain these limitations. *American Airlines, Inc. v. Dept. of Transportation*, 200 F.3d at 806. The Fifth Circuit dismissed as unpersuasive the Colorado Supreme Court decision in *ACPAA v. Centennial Express Airlines, Inc.*, 956 P.2d at 591, 595, while conceding that the courts have not defined the scope of authority as a proprietor and there is no uniform rule. *Id.* at 807.

As the Colorado Supreme Court and other decisions demonstrate there is significant debate and inconsistent decisions interpreting the breadth of §41713(b)(1) and (3). Nevertheless, the discussion below shows that the legal question finds widely varying results and certainly this Court's guidance is needed.

A. Defining "Related To"

In interpreting §41713(b)(1), this Court has broadly construed the "related to" phrase to include direct and indirect effects on rates, routes or services and has determined that the preemption provision displaces all state laws that fall within its sphere, even including those that are consistent with the federal law's substantive requirements. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-387 (1992); *see also American Airlines, Inc. v. Wolens*, 513 U.S. at 224. In focusing on whether the state law merely had a "connection with or reference" to airlines rates, routes, or services, the Court emphasized that Congress did not intend to "hobble competition for airline passengers through the application of restrictive state laws." However, neither *Morales* or *Wolens* concerned the proprietary rights exception to preemption in §41713(b)(3).

B. The Proprietary Powers Exception and Its Limits

1. Rationale for Proprietor Exception

The proprietor exception reflects the fact that airport proprietors must exercise powers and authorities not governed by federal law, including the purchase and lease of land, construction, maintenance, and rehabilitation of aviation facilities, and the hiring and firing of employees, to name just a few such functions. *Air Transportation Assn. v. Crotti*, 389 F. Supp. 58, 61 (N.D. Calif. 1975); *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 746 (N.D. Ohio 1995). The proprietor exception also

preserves the airport's common law liability, including that for noise damages. This Court held in *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1961), that an airport proprietor was the party responsible for noise damage caused by aircraft using the airport.

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court distinguished between cities attempting to limit noise from airports and airports imposing their own rules. The Court set aside Burbank's noise controls because it did not own the airport. "We do not consider here what limits, if any, apply to a municipality as a proprietor . . . 'Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' " *Id.* at 637 n. 14, *quoting* an opinion letter from the Secretary of Transportation.

The ADA's proprietor exception reflects these earlier principles and any attempt by the federal government to "regulate noise directly at local airports would jeopardize federal immunity from liability for noise damage." P. Dempsey, *Aviation Law*, p. 8-25 (1992). Since a municipal proprietor is accountable for damages caused by excessive noise, the airport may exercise some measure of control over such noise. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1991).

Other courts have interpreted the proprietary powers exception as reserving only a "limited role" for local airport proprietors in regulating noise levels at their airports. *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991); *Santa Monica Airport Assn. v.*

City of Santa Monica, 659 F.2d 100, 104 (9th Cir. 1981) ("Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs").

There is general agreement that state and local governments who do not own an airport (non-proprietors) cannot regulate aviation services or noise impacts. *See e.g. City of Burbank v. Lockheed Air Terminal*, 411 U.S. at 637; *State of Minnesota v. Metropolitan Airports Commission*, 520 N.W.2d 388, 391 (Minn. 1994). However, if the airport proprietor is involved in the permitting process, then a city, as opposed to the port authority which actually operates the airport, may adopt noise and other restrictions. *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998) (affirming authority of city, which also owns the airport, to regulate helicopter operations under both its police powers and proprietary powers).[2]

2. Land Use and Airport Operations

The Fifth Circuit incorrectly concluded that the proprietary rights exception is limited to noise, traffic congestion and pollution. *American Airlines*, 200 F.3d at 807.

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[2] The Second Circuit does not try to resolve the apparent conflicts with an earlier holding that noise restrictions were limited to local airport noise. *See British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977) (a local airport proprietor is "vested only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs").

Certainly, the statute itself does not define or limit the proprietary powers and rights of airport owners. §41713(b)(3). Moreover, the federal courts have also recognized that the federal aviation laws do not address ownership and operation of public airports. *Communities, Inc. v. Busey*, 956 F.2d 619, 621 (6th Cir. 1992). Instead, land use decisions have traditionally been the prerogative of state and local governments and are not addressed in the federal aviation laws. Cities may also adopt land use restrictions which may affect the operation of an airport. *Dallas/Fort Worth Intl. Airport Bd. v. City of Irving*, 854 S.W.2d 161 (Tex. App. 1993), *judgment vacated without ref. to merits*, 868 S.W.2d 750 (Tex. 1993) (*per curiam*); *City of Cleveland v. City of Brook Park*, 893 F. Supp. at 746.

The Airports and Airways Improvement Act ("AAIA"), codified at 49 U.S.C. §§47101, *et seq.*, only authorizes FAA to work with local land use jurisdictions to avoid incompatible zoning. While DOT is charged to maintain the safe operation of the airports, §47101(a)(1), DOT must do so by cooperating with state and local officials. §47101(g)(1). The literature concerning airport policy attribute the lack of airport capacity to the fact that land use and airport ownership and maintenance are left in the hands of state and local governments. *See e.g.* L. L. Creswell, *Airport Policy in the U.S.: The Need for Accountability, Planning and Leadership*, 19 TRANSP. L. J. 1, 8 (1990).

3. Use Restrictions Related to Safety and Traffic

In *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D. N.Y. 1986), *aff'd* 817

F.2d 222 (2d Cir.), *cert. denied*, 485 U.S. 1006 (1987), the court upheld a perimeter rule at LaGuardia Airport which prohibited airlines from using the airport to run nonstop flights beyond a set distance. *Id.* at 953. The stated purpose of the rule was to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to other airports. *Id.* In holding that the proprietary powers exception applied, the court noted that the issue had often arisen in the context of noise regulations but held that the exception "does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind." *Id.* at 957. The court added, "A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise." *Id.*

In *Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D. N.Y. 1984), an airline sought an injunction requiring the county to provide immediate access to the airport. Due to increased traffic at the airport, the county had postponed ruling on all new applications to operate at the airport pending a review of policies with respect to airport operations, for safety reasons. *Id.* at 438. In analyzing the proprietary powers exception, the court stated, "The legislative history is unmistakably clear that Congress did not intend that the preemptive force of [§41713(b)(1)] would interfere with 'long recognized powers of the airport operators to deal with noise and *other environmental problems* at the local level.' " *Id.* at 440 n. 18, *quoting* 124 Cong. Rec. 37419 (1978)(remarks of Sen.

Kennedy)(emphasis added). In fact, in response to the language in the *British Airways* cases, which appear to limit a proprietor's powers to noise control, the court added that a local airport operator can "issue non-discriminatory rules defining the permissible level of noise *or other danger* which can be created by an aircraft using the airport." *Id.* at 441. The court upheld the temporary ban, noting that the county was acting responsibly in seeking to protect the safety of passengers and others who use the facility at the airport. *Id.*

More recently, the Second Circuit held that the proprietor exception cannot be limited strictly to regulations dealing with noise. *National Helicopter Corp.*, 137 F.3d at 88. Instead, the municipal owner of an airport is uniquely situated to address such concerns as ground congestion, and must therefore be granted some leeway, under the proprietor exception, in this area. *Id.*

C. Proprietary Powers Delineated By State Law

Some courts focus on the statutory delegation of authority in analyzing a local proprietor's rights and powers. In *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986), the court found that seasonal restrictions imposed on a year-round fixed based air carrier operator were indeed a valid exercise of the municipality's proprietary rights. *Id.* at 97. In defining the scope of the proprietary powers exception, the court looked to the express statutory delegation of authority that created the governing airport body and found that there was broad authority to deny year-long operating rights. *Id.* at 96. *See also Sea Air Shuttle v. Virgin Islands Port Authority,*

800 F. Supp. 293, 305 (D. Virgin Is. 1992)(in holding that the local Port Authority acted within the proprietary powers exception in the award of an exclusive seaplane ramp agreement, the court also looked to the statutory delegation of authority in analyzing the Port Authority's specific proprietary powers and rights).

The Fifth Circuit failed to address the Texas Municipal Airports Act ("TMAA") which provides broad authority to municipal airport owners. Instead the Fifth Circuit carefully distinguished or declined to follow the number of decisions affirming the use of proprietary powers. *American Airlines,* 202 F.3d at 807. The concession that there are contrary outcomes supports the petition for the writ of *certiorari.*

III. FEDERAL EFFORTS TO DOMINATE AIRPORT MANAGEMENT ADVERSELY AFFECTS COMMUNITIES

Communities like Greenwood Village are directly and immediately affected by the conflicts between DOT and an airport's definition of its powers. Greenwood Village participates as a member of the Denver Regional Council of Governments ("DRCOG") which is charged with coordinating transportation planning decisions among 47 city and county governments in the Denver metropolitan area. *ACPAA v. Centennial Express Airlines, Inc.,* 956 P.2d at 589. DRCOG seeks to coordinate local government transportation decisions, such as road improvements, traffic routing, and airports to promote the best use of public resources. Both Arapahoe County and Greenwood Village have been members of DRCOG,

and supported the regional aviation system plans allocating air service among the metropolitan area's several airports. *Id.*

Greenwood Village relied on the allocation of air service in preparing its comprehensive plan and making zoning decisions which approved location of residential development and construction of schools. Greenwood Village needs reasonable certainty regarding both the location and purpose of transportation facilities, and needs to be able to rely on those decisions in making their own governmental decisions. Certainly, the communities around Love Field also made decisions relying upon the allocation of air traffic in the metropolitan area. These relationships are relatively fixed and should not be disrupted decades later based on expansive principles of federal preemption.

The testimony developed in the *ACPAA v. FAA* proceeding demonstrated the significant local community impacts if local transportation decisions can be upset by a federal agency decades later. In the Centennial Airport matter, Centennial Express proposed to begin offering scheduled passenger service at the general aviation airport. His 1993 proposal, which is still on file with the ACPAA, would have had 119 flights a week with up to 630,000 passengers a year (assuming a 75% load factor) and more than 36,000 operations a year. Centennial Airport's operational capacity is 525,000 operations a year and in 1998 it had about 468,000 operations. In light of Centennial Airport's 1998 operations, the Centennial Express operations would bring Centennial Airport to 95 percent of its capacity. Moreover, because there are no other carriers, the 630,000 passengers a year would drive

to and from Centennial Airport using roads in Arapahoe County and Greenwood Village.

Fire and emergency rescue, surface roads, and parking are all issues over which DOT has no jurisdiction and yet are directly related to any decision to allow various types of aviation services at a particular airport. When a metropolitan area, like Dallas-Fort Worth or Denver already has a major regional passenger airport, it is reasonable for the airport proprietors to try to address regional transportation issues to accommodate surface and air transportation in a way which makes sense for the entire community. This is the reasonable scope and intent of the proprietary powers exception and without review, the problems faced by communities will continue to be unresolved.

The examples of the problems communities face when dealing with the location and effects of airports are numerous. The communities near Love Field adopted land use and zoning restrictions to prevent the airport from growing. *Dallas/Fort Worth Intl. Airport Bd. v. City of Irving Texas,* 854 S.W. 2d at 168. The Texas courts permitted land use ordinances designed to limit expansion of Love Field. *See also City of Burbank v. Burbank Glendale-Pasadena Airport Auth.,* 72 Cal. App. 4th 366, 85 Cal. Rptr. 2d 28 (Cal. App. 1999). However, the federal courts are generally unsympathetic to non-proprietor ordinances or efforts to enforce land use and environmental laws. *State of Minnesota v. Metropolitan Airports Commission,* 520 N.W.2d at 391; *City of Bridgeton v. City of St. Louis,* 2000 WL 364878 (Mo. App. E.D. 2000) Slip op. at 5.

IV. CONCLUSION

This case meets the Court's standard for a writ of *certiorari*. There are numerous conflicting decisions applying in theory the same law to similar situations with differing outcomes. This confusion is not only difficult for proprietor airports but it is equally difficult for the communities located near the airports. For these reasons, the City of Greenwood Village respectfully urges this Court to grant the writ.

Respectfully submitted,

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AMERICAN AIRLINES, INC.,
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THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

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REPLY

The sheer volume of briefs filed in this case confirms its national importance, and makes clear that this Court should grant review of the single essential question presented in the petition for certiorari filed by American Airlines, Inc. ("American") – whether Section 41713(b)(3) of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(3), preserves from preemption the "proprietary powers and rights" of local governments that own multiple airports to allocate particular types of air traffic to specific airports. The remaining petitions should be held for appropriate disposition after this central issue has been decided.

1. Guidance from this Court is plainly needed as to what "proprietary powers and rights" § 41713(b)(3) of the ADA reserves to state and local governments.

a. Even the Respondents opposing American's petition cannot agree on the meaning of the provision. They do not contest that it allows perimeter restrictions and other similar limits on the number and types of flights permitted at particular airports within a regional airport system. Nor could they. The Second Circuit specifically held that such a restriction on flights from New York's LaGuardia Airport was a permissible exercise of local "proprietary powers and rights," and thus was saved from preemption under the ADA. *Western Air Lines, Inc. v. Port Auth.*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The Colorado Supreme Court likewise held that the ADA's "proprietary powers and rights" provision preserves broad authority to state and local governments to forbid commercial flights entirely from one airport in a regional system. *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). Similarly, the Department of Transportation (the "Department") is forced to acknowledge that it defended as a legitimate exercise of

proprietary powers a perimeter restriction it had imposed on Washington National Airport for precisely the same reasons (preserving the economic viability of another airport) that support the restrictions at issue here. (Brief in Opposition of Respondent Department of Transportation in Nos. 99-1462, 99-1739, and 99-1745 ("Dep't Op.") at 19-20 n.17). *See City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1987).

Seeking to reconcile those results with the contrary conclusion reached by the Fifth Circuit in this case, Respondents variously suggest that those cases differ from this one because route restrictions were justified on "narrow" grounds of alleviating noise, ground congestion, or other "environmental" concerns (Dep't Op. at 16), or on the ground of preventing "severe underutilization" of an airport and preserving that airport's "economic viability." (Dep't Op. at 19-20 n.17). The common thread uniting those disparate justifications, they insist, is the "settled" principle that an exercise of local proprietary power must be "reasonable, non-arbitrary and non-discriminatory." (Dep't Op. at 16). But that test provides no meaningful guidance. Nor have Respondents offered any other administrable legal standard that explains why an exercise of "proprietary powers and rights" can legitimately encompass route restrictions in New York, Colorado and Washington D.C., but not in Dallas and Fort Worth. Indeed, the narrow reading of § 41713(b)(3) the Department now presses is sharply different from the position it took before this Court in the *Western Air Lines* case. In that earlier brief, after surveying the legislative history, the Department contended that if Congress had intended to limit local authorities to noise and traffic regulation "Congress presumably would have drafted the provision more narrowly than it did." Brief for the United States as *Amicus Curiae* in *Delta Airlines, Inc. v. Port Authority*, No. 87-333 at 7-10 (U.S.

filed March 29, 1988). Thus, local authorities do not know when they may impose restrictions of the kind at issue here, and when they may not.

b. The best the Department can do is to suggest (in a footnote) that the present case differs from the other situations where route restrictions have been upheld because § 41713(b)(3) protects only a restriction that is "currently needed," irrespective of whether the restriction was "once justified as a permissible exercise of an airport owner's proprietary rights." (Dep't Op. at 17 n.16; *see also* Brief in Opposition of Respondent Southwest Airlines in Nos. 99-1462, 99-1745 ("SW Op.") at 16-17). In other words, the covenants in the Bond Ordinance were a legitimate exercise of local proprietary powers and rights when imposed, but nevertheless remain perpetually vulnerable to a future decision that they have outlived their usefulness. What is worse, the Department claims for itself the authority to decide whether "changed conditions" justify abrogation of an airport proprietor's restrictions as a matter of regulatory discretion. The Department also arrogates to itself the discretion to choose *when* it can order a local government to come forward and prove that its previously legitimate restriction continues to have force.[1/] And these newly discovered powers are to be exercised without any meaningful substantive standards to guide decisionmaking, and are to be subject to deferential judicial review.

1/ Here, the Department did so in a declaratory order proceeding convened under 5 U.S.C. § 554(e) without giving notice that it intended to make factual determinations, and placed the burden of proof on Petitioners to prove an absence of changed conditions. *But see* 5 U.S.C. § 556(d); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

The Department's position is radical, both as a matter of substantive law and as a matter of federalism. Far from providing a reason to deny certiorari, it highlights the compelling need for review. *First*, the "currently needed" standard proposed by the Department and adopted by the Fifth Circuit quite plainly *is* a new rule of law that finds no support in the statutory text, the legislative history, or any prior judicial decision. More importantly, that new rule injects a double uncertainty into the regional planning process. Local authorities seeking to enact regional plans, and to provide the assurances necessary to the financial markets to ensure funding for the execution of such plans, do not know at the outset the scope of their substantive authority to impose restrictions on traffic at a single airport within a regional system, and likewise do not know whether the Department will pull the rug out from under them in the future on the basis of a new administration's shifting view about the meaning of the term "proprietary powers and rights." The Department disparages as "unsupported" American's claim that the Fifth Circuit's "currently needed" standard is antithetical to the long-term predictability necessary for successful regional planning. But the record shows that such restrictions were necessary to facilitate the consolidation of passenger air traffic at DFW Airport in the first instance. Without such assurances the bond markets would not have provided the long-term financing necessary to make the venture work, and airlines would not have undertaken the enormous commitments such a venture requires. Local authorities across the country will continue to confront the same situation when they seek to execute comprehensive regional plans. It is simply common sense that regional planning initiatives of the kind at issue here and in the *Arapahoe* case, as well as those underway or contemplated by other local authorities across the country, will be severely undermined by the legal rule the Fifth Circuit has announced.

Second, the Department's position has the perverse consequence of penalizing successful exercises of the very activity Congress intended to preserve in § 41713(b)(3). Regional authorities with the foresight to anticipate and avoid congestion, noise, and other environmental problems, by allocating air traffic among regional airports as part of a regional plan, are particularly at risk under the Department's "currently needed" standard. The more successful such efforts are, the greater the risk that the Department will decide that "changed conditions" warrant their abolition. It is precisely this uncertainty that will prevent such efforts in the first place.

At bottom, Respondents' position rests on the naive and counterfactual assumption that justifications such as reducing noise pollution or ground congestion, or ensuring sufficient utilization of an airport, are stand-alone local policy objectives. That fundamentally misunderstands the nature of regional planning, which involves a web of mutually dependent goals and undertakings. Ground congestion or noise pollution around a particular airport cannot be alleviated unless air traffic can be diverted to another airport. That cannot be accomplished unless the airport to which local authorities seek to divert the traffic is economically viable (*i.e.*, it must exist in order for the plan to work). An airport will not be economically viable if it is severely underutilized, and severe underutilization is a risk unless local authorities have some means to ensure an adequate level of air traffic at the airport. Correlatively, the financial markets will not fund the construction and expansion of an airport without adequate assurances that it will generate sufficient revenues to cover long-term financial commitments. Thus, restrictions of the kind at issue in the Bond Ordinance are not imposed "for their own sake." They are imposed as part of an effort to accomplish multiple goals within a regional plan.

Third, the Department's assertion that it is entitled to deference in its determination whether restrictions imposed by local authorities remain "currently needed" provides an independent federalism-based reason for this Court's review. After all, § 41713(b)(3) expresses Congress' intent that the ADA "does not limit" traditional state and local proprietary powers and rights. The Department's view that it is has been delegated by Congress standardless power to decide when state and local planning prerogatives should give way to the federal policy objectives of the ADA is thus antithetical to the very point of § 41713(b)(3). Congress cannot have intended to leave to a federal agency (subject to deferential judicial review) the power to decide the scope of reserved local authority. Particularly flawed is the Department's contention that a local restriction should be deemed "reasonable, non-arbitrary and non-discriminatory" only if it is consistent with the Department's current method of attempting to promote airline competition. (Dep't Op. at 16). If Congress intended to preserve only exercises of local proprietary power that the Department deems consistent with the ADA's competition goals, § 41713(b)(3) would not have been needed. If local actions do not materially affect airline rates, routes or service, there would be no basis for preemption to begin with. The very point of § 41713(b)(3) was to strike a balance between the federal policy of promoting competition, and state and local planning needs that might be in tension with that overarching policy in some instances. But the Department's position is devoid of balance.[2/]

2/ The recent decision of the Texas Court of Appeals in *Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV, __S.W.3d__, 2000 WL 680256 (Tex. App. – Fort Worth May 25, 2000) adds nothing to Respondents' position. The Texas court held only that it was obligated by *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to defer to the Department's views, even if it would have decided

c. Finally, the Department's effort to explain away the conflicts with *Western Air Lines* and *Arapahoe* is particularly unpersuasive. Respondents simply fail to answer American's point that the route restriction at issue in *Western Air Lines* was imposed for *two* reasons: "to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark." *Western Air Lines, Inc. v. Port Auth.*, 658 F. Supp. 952, 953 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). Thus, *Western Air Lines* cannot be distinguished on the basis that it applied only to a restriction designed to reduce ground congestion. Similarly, the Department here suggests that the decision of the Colorado Supreme Court in *Arapahoe* can be distinguished because that court concluded that the local restrictions at issue did not relate to routes, and thus were not within the ADA's general preemption clause in the first instance. (Dep't Op. at 20). To be sure, the Colorado Supreme Court did express a doubt as to whether the restrictions at issue related to routes. But, in the administrative proceeding instituted in response to the Colorado Supreme Court's ruling, the FAA expressly condemned the very restriction at issue in *Arapahoe* as a "violat[ion] of Congress' express prohibition, in 49 U.S.C. § 41713(b)(1), on state and local regulation of air carrier rates, routes, or services." *Centential Express Airlines*, FAA Order No. 1999-1 (Part 16, Subpart G) at p.17 (Feb. 18, 1999). The Department cannot now contend that review is unwarranted here because the restrictions in Colorado did not relate to routes.

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the case differently. *But see Christensen v. Harris County*, 120 S. Ct. 1655, 1662-63 (2000); *Medtronics, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring). If anything, the Texas court's ruling increases the need for review of the Fifth Circuit's decision.

Nor can *Arapahoe* be distinguished from this case on the ground that it involved restrictions on service that had not previously existed, whereas the restrictions at issue here limited preexisting service. The ban on scheduled passenger service at Centennial Airport simply eliminates that one airport as a possible point of departure or arrival for that type of service in the Denver area. Such service must use Denver International Airport. The Dallas - Fort Worth Bond Ordinance restrictions simply eliminate Love Field as a possible point of departure or arrival for long-haul passenger service into North Texas. Such service must operate from DFW Airport.[3/] The restrictions thus have precisely the same effect.

2. The implied preemption issue raised by the Department and other Respondents is a red herring. To begin with, the Fifth Circuit did not hold (even as an alternative ground) that the Wright and Shelby Amendments impliedly preempt the requirements of the Bond Ordinance. The Fifth Circuit's decision rests entirely on the broad holding that the "proprietary powers and rights" provision of the ADA does not preserve local authority to allocate traffic among regional airports, except in extremely narrow circumstances. It is that broad holding which conflicts with decisions of the Second Circuit and Colorado Supreme Court, and which injects intolerable uncertainty into the meaning of a statutory provision designed to clarify and protect the authority of states and localities to engage in regional planning. The Fifth Circuit has not held

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3/ Respondents' assertions that Dallas is not a proprietor of DFW Airport (Dep't Op. at 10 n.8; SW Op. at 14 n.10) are wrong. Texas courts have authoritatively held that under Texas law, the DFW Airport Board is merely an agency of the Cities of Dallas and Fort Worth, and not an independent political subdivision. *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 829 (Tex. 1974); *City of Irving v. Dallas/Fort Worth Int'l Airport Board*, 894 S.W.2d 456, 459 (Tex. App. – Fort Worth 1995, writ denied).

merely that Dallas and Fort Worth cannot enforce the conditions of the Bond Ordinance. It has held that the ADA prohibits any local authority from allocating traffic among airports as part of a regional plan unless the local authority can show that the allocation is "currently needed" to address local problems that the Fifth Circuit has not defined with any clarity whatsoever. Thus, whatever the preemptive scope of the Wright and Shelby Amendments, review of the Fifth Circuit's decision is necessary to ensure a nationally uniform interpretation of § 41713(b)(3) and to eliminate the destabilizing uncertainty the Fifth Circuit's decision has introduced.

In any event, Respondents' implied preemption argument is unpersuasive. The Wright and Shelby Amendments contain no express preemption provision different from the ADA's preemption provisions. It is a cardinal rule that where Congress has included an express preemption provision, the proponent of preemption faces a heavy burden to show that Congress still means to preserve implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). Congress had no such intent here, as the legislative history of the Wright and Shelby Amendments make plain. *See* American Pet. at 9.[4/]

4/ Southwest's argument that this legislative history must be read in the context of CAB Order 79-9-192, 83 C.A.B. 644 (1979), is misleading. The CAB decided *only* that in granting Southwest authority to serve New Orleans under the ADA's Automatic Market Entry program, the CAB lacked authority to consider any factor other than Southwest's fitness to operate the route. The Order specfically stated that "our action . . . does not prevent [Dallas] from exercising whatever legitimate proprietary rights it has. The issue of the extent to which [Dallas's] proprietary rights may be exercised is under consideration [in other pending cases] and we will reserve

Moreover, the implied preemption issue identified by Respondents cannot be decided without first deciding the question presented in American's petition. Because the legislative history of the Wright and Shelby Amendments makes clear that Congress was not intending to alter the scope of the "proprietary powers and rights" the ADA had reserved to the local authorities in Dallas and Fort Worth (and the legislative history of the ADA itself indicated that Congress did not intend to change the terms of the Bond Ordinance, *see* American Pet. at 8), the question whether the Wright and Shelby Amendments preempt the Bond Ordinance cannot be decided until the question whether § 41713(b)(3) preserves the Bond Ordinance is first answered. Thus, Respondents' argument about the Wright and Shelby Amendments does not provide a reason to deny certiorari. It reinforces the need for this Court's review.

3. American agrees with the various Respondents that none of the other questions presented by the Petitioners in Nos. 99-1462 and 99-1739 warrant review at this time. Those petitions should be held pending decision of the issue American has raised.

CONCLUSION

The petition for certiorari in No. 99-1745 should be granted. The petitions in Nos. 99-1462 and 99-1739 should be held.

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discussion of the point until that opinion." 83 C.A.B. at 652. Enactment of the Wright Amendment eliminated any need to decide those other cases.

Respectfully submitted,

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